84-1687

No.

Office - Supreme Court, U.S.
FILED
APR 24 1985
ALEXANDER L. STEVAS,
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IN THE

# Supreme Court of the United States

October Term, 1984

RONALD O. BUBAR, et al.,
*Petitioners,*

v.

AMPCO FOODS, INC., et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

I.

Does the "derivative injury" rule denying antitrust standing under Section 4 of the Clayton Act, 15 U.S.C § 15, to corporate shareholders, apply where the intended corporation was never formed?

II.

Under circumstances where a violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, has prevented the formation of contracts and financial commitments necesary for a potential competitor to enter the market in competition with the wrongdoer, should petitioners' antitrust standing be dependent on the existence of such contracts and financial commitments?

## PARTIES

Petitioners — plaintiffs-appellants below — are Ronald O. Bubar, Donald J. Nowatzki, William M. Barth, Charles W. Houpt, John J. Netterberg, and James F. Palo.

Respondents — defendants-appellees below — are Ampco Foods, Inc., a California corporation; Alexander & Baldwin, Inc., a Hawaii corporation; and Rogers Foods, Inc., a Delaware corporation.

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AMPCO FOODS, INC., et al.,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Ronald O. Bubar, et al., respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit affirming summary judgment dismissing petitioners' complaint for lack of standing is reported at 752 F.2d 445, as set forth in Appendix "A" to this Petition. The district court's opinion is reported at 539 F.Supp. 535 (D.C.Ida. 1982), as set forth in Appendix "B" to this Petition.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit upholding the decision of the district court

was entered on January 25, 1985. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit by Writ of Certiorari pursuant to 28 U.S.C. § 2101(c).

## STATUTES INVOLVED IN THE CASE

15 U.S.C. §§ 1 and 2 (Sherman Act); 15 U.S.C. § 15(a) (Clayton Act). See Appendix "C."

## STATEMENT OF THE CASE

### A. Background

This case arises out of the attempt by the top management employees of Rogers Foods, Inc. ("Rogers"), a corporation that processed dehydrated potato, onion and garlic products in Idaho and California, to acquire the stock of Rogers from its parent corporation, Alexander & Baldwin, Inc. ("A & B") in late 1978 and January 1979. The top management employees (sometimes referred to herein as "the Management Group") included petitioners Bubar, the President of Rogers; Nowatzki, V.P. for Finance; Barth, General Manager of the Potato Divison; Houpt, V.P. of Marketing; Netterberg, New Products Director; and Palo, General Manager of the Onion and Garlic Division. Management decided to investigate the acquisition of Rogers when the president of A & B advised them in the summer of 1978, that A & B intended to divest itself of its Rogers subsidiary, and encouraged the possibility of a management buy-out. App A, 3a-4a.

Throughout the fall and early winter of 1978, the Management Group were involved in a number of discussions and meetings with various financial institutions to determine the availability of equity venture capital and debt financing for the purchase of Rogers. Mr. Bubar, Rogers' president, and Mr. Nowatzki, Rogers' Chief Financial Officer, met in Idaho

Falls, Chicago and Seattle with representatives of a number of banks interested in providing debt financing for the management buy-out. Verbal assurances were provided that these banks would participate as lenders if and when a letter of intent was signed. Also provided were letters reflecting the banks' keen interest in providing necessary debt financing for a management buy-out of Rogers. App D, 6d-16d.

During the same period, meetings were held with venture capital firms, primarily First Capital Corporation of Chicago and Security Pacific Capital Corporation, the respective venture capital subsidiaries of the First National Bank of Chicago and Security Pacific Bank. A number of *pro forma* financial projections were prepared by the Rogers Management Group at the request of the venture capitalists. The interest of the venture capitalists in providing necessary equity to finance the acquisition of Rogers was uniformly enthusiastic. App B, 7b.

During November and early December of 1978, negotiations continued between the Management Group and A & B as to a price for Rogers. App A, 5a. Meanwhile, unbeknownst to the Rogers Management Group, Ampco Foods, Inc. ("Ampco") was investigating the opportunity to acquire Rogers' Dehydrated Potato Division. Rogers was Ampco's principal competitor in most of the dehydrated potato products produced by Rogers. In some product lines, such as dehydrated hashbrowns and agglomerated potato products, Ampco and Rogers shared 100% of the market. Rogers and Ampco were both oriented to the sale of dehydrated potato products in the food service market, i.e., away from home dining, and shared over 55% of the dehydrated potato sales in that market. App B, 15b.

Rogers, whose marketing policies and practices were established by the Management Group, had an industry reputation as a price cutter. Ampco's own contemporaneous documents demonstrated a recognition that Rogers was a

major competitor whose market strategy was to sell at lower prices than Ampco. According to the handwritten notes of a key member of Ampco's ad hoc Rogers Acquisition Team, one of the principal values of the acquisition of Rogers by Ampco was "market stabilization" and the elimination of a "market disrupter" and "an overcapacity producer." App D, 1d-2d. Ampco decided to make an offer and, on December 15, 1978, transmitted a written offer to A & B for purchase of the potato division assets of Rogers for $10,000,000. App A, 5a.

On December 28 or 29, 1978, after having received Ampco's written offer for the purchase of the potato division assets, A & B's negotiator offered to sell the stock of Rogers Foods to the Rogers Management Group for $13,500,000. A January 9, 1979 meeting was scheduled between A & B's negotiator and the Management Group in San Francisco, California. App A, 5a.

Preparatory to the January 9, 1979 meeting, representatives of First Capital and Security Pacific together concluded that even under the most conservative projections, the $13.5 million price represented a "do-able deal," i.e., the management could buy the company at that figure on the basis of a leveraged buy-out resulting in an adequate projected rate of return for the equity investors. App D, 21d-22d, 25d. Over a month earlier, the Management Group had made individual investment commitments of a minimum $50,000 each. App D, 37d. No money was put up at that time because none was required; however, each of the Management Group had the wherewithal to carry through on his commitment.

Throughout the negotiations, but more intensely during the meetings between the Management Group and the venture capitalists preparatory to the January 9, 1979 meeting with A & B, there were discussions as to the manner in which the acquisition would be made. It was understood that a new corporation would be formed which would acquire either the assets or the stock of Rogers. The percentage of the stock

that the management would receive would be at least 10% as the Management group had committed to invest $300,000 in cash, approximately one-tenth of the equity capital required to meet A & B's $13,500,000 price for Rogers. Additionally, there was general expectation by both the Management Group and the venture capitalists that the Management Group would be able to earn additional "sweat equity" as the managers of Rogers and the producers of Rogers' expected profits. Although the expectation of the "sweat equity" percentage that could be earned by the Management Group varied, i.e., the venture capitalists expected the Management Group could earn an additional 10 to 15% in sweat equity while some of the Management Group believed that the sweat equity could go as high as 35%, this was of no immediate concern to the Management Group. The resolution of such matters were premature until there was agreement in principal with A & B as to a purchase price. App A, 9a-11a; App D, 39a-41a.

At the critical January 9, 1979 meeting, the Management Team informed A & B's representative that the $13,500,000 counter-offer was acceptable. As of that date, neither the banks nor the venture capital firms had formally committed because an agreement in principal by A & B as to the purchase price was necessary before formal commitments could ensue. App B, 7b; App D, 13d, 15d-17d, 19d, 32d-34d. As it had indicated in previous discussions, A & B agreed to accept certain of Rogers' assets worth $9,700,000 of the $13,500,000 price as part payment. The balance of the purchase price was to be financed by (1) the investment of equity funds by First Chicago, Security Pacific, and the Management Team and (2) senior debt financing by the banks. If senior debt financing had been required to put the deal together, the amount of financing would have been $800,000 or less. The venture capitalists believed that it would be relatively easy to obtain such financing in light of the excellent facilities of Rogers Food that could be pledged as collateral. App A, 11a-12a; App D, 20d, 22d-24d, 29d-30d.

The only sticking point was the question of how much time would be necessary to actually obtain the formal

commitments. Bubar asked for 120 days because only five or six working days had elapsed since A & B had lowered its price to $13,500,000 and the venture capital organizations were required by their own internal guidelines to examine Rogers' books and independently substantiate the financial projections. When A & B informed the Management Team that it desired to close the sale of Rogers by March 31, 1979, Mr. Smith, the representative of First Capital Corp. who was present at the meeting, responded that the entire equity portion of the transaction would be firmed up within six weeks time. Upon questioning by A & B's negotiator as to his estimate of the chance of the deal going together, Smith responded with traditional banker's conservatism that the chances were 80% plus. The meeting broke up with A & B's representative informing the Management Group that A & B's president would be informed and A & B would get back to Bubar later in the day. The Management Team representatives and Mr. Smith, the First Capital Corp. representative, left the meeting confident of a positive response from Evans. App A, 11a-12a; App B, 9b; App D, 17d-18d.

The deal between the Management Group and A & B was never consummated because Ampco intervened with its own offer to A & B during the afternoon of January 9. Ampco and A & B made a deal which was closed on March 15, 1980, whereby A & B sold to Ampco the assets of Rogers' potato division for $11,350,000. The onion and garlic division of Rogers was sold separately, at a later date. App A, 13a.

Both before and after the agreement in principal, there were several discussions between Ampco and A & B concerning antitrust exposure. App B, 15b; App D, 3d. As late as February 7, 1979, there were discussions with Ampco's outside lawyers concerning the ongoing investigation by the U.S. Department of Justice and the possibility of antitrust litigation by "Injured Party (Grower, Customer, RFI)." App D, 4d. The reference to RFI could only mean the Management Group of Rogers Foods, Inc. The same page of notes refers to the lack of the divestiture remedy in private actions within the jurisdiction of U.S. Court of Appeals for the Ninth Circuit.

The values gained by eliminating a market disruptor and overcapacity producer were quickly evident. Two of Rogers' three potato processing plants had been closed down by 1980. Rogers' production line for dehydrated hashbrowns at its Rexburg, Idaho plant (Ampco's sole competitor prior to the acquisition) was never used. App D, 45d-50d.

The value of "market stabilization" was inevitably realized. By early 1982, the Ampco price lists for dehydrated potato products formerly produced by Rogers, had increased by two to threefold over pre-acquisition prices. During the same period, the farm price of raw potatoes used to manufacture dehydrated potato products had decreased relative to fresh (eating) potato prices. App D, 42d-44d.

This suit, based *inter alia* on an agreement in restraint of trade by respondents in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, together with monopoly and attempted monopolization of the dehydrated potato market by Ampco in violation of § 2 of the Sherman Act, 15 U.S.C. § 2, followed. Petitioners sued for damages in the amount of the loss of their expectancy, i.e., the estimated foregone income stream of Rogers and the resulting increase in the value of management's share of total equity in the company. App D, 44d.

**B. Proceedings Below.**

On respondent's motion for summary judgment in the trial court below, the court found that there was evidence of (1) a contract or conspiracy which had as its intended and actual effect the elimination of petitioners as a potential competitor, and (2) monopolization or attempted monopolization of the processed potato market. The trial court further found antitrust injury because the anti-competitive intent or result is the type of injury the antitrust laws were intended to prevent and allowing petitioners to bring a suit for damages would further the enforcement purpose of § 4 of the Clayton Act and §§ 1 and 2 of the Sherman Act. App B, 13d-20b.

Notwithstanding the foregoing findings, the trial court granted summary judgment of dismissal on the ground that the Management Group had not demonstrated the existence of contracts necessary to enter the market and hence could not show sufficient preparedness as a potential competitor to suffer injury to their business and property within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15(a). App B, 20b-32b.

On appeal, the United States Court of Appeals for the Ninth Circuit analyzed petitioners' standing against the measure of the policy factors mentioned by this Court in *Associated General Contractors* v. *Carpenters*, 459 U.S. 519, 74 L.Ed.2d 723, 103 S.Ct. 897 (1983). Those five factors were expressed by the Court of Appeals as follows:

> "(1) the nature of the plaintiff's alleged injury — whether it was the type of antitrust laws were intended to forestall,
>
> (2) the directness of the injury,
>
> (3) the speculative measure of the harm,
>
> (4) the risk of duplicative recovery, and
>
> (5) the complexity in apportioning damages.

459 U.S. at 538-45, 103 S.Ct. at 908-13." App A, 18a.

On the basis of its analysis, the Court of Appeals affirmed the trial court's dismissal for lack of preparedness but disagreed with the trial court's finding that petitioners could demonstrate antitrust injury. The Court of Appeals found *sua sponte* that the potential competitor was a to-be-formed corporation that the Management Group intended to form with the venture capital firms before closing the acquisition of Rogers. Since the petitioners were to be 10 to 25% stockholders in the corporation when it was formed, the Court applied the "shareholder derivative injury" rule in denying antitrust standing on the grounds that the Management Group's injury was indirect and there would be a risk of

duplicative recovery and complex apportionment of damages if the Management Group were allowed to sue respondents for antitrust violations arising from the acquisition of Rogers by Ampco. App A, 24a-31a.

The Court of Appeals agreed with the trial court that lack of a binding contract to acquire the assets necessary to compete together with lack of binding financial commitments necessary to complete the acquisition were highly relevant factors in determining how close the Management Group was to becoming a competitor and whether petitioners' harm was speculative *irrespective* of whether the antitrust violation complained of, necessarily foreclosed the existence of these contracts and financial commitments. App. A, 31a-36a.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Court of Appeals has imposed new and artificial restrictions on the law of antitrust standing, which conflict with this Court's recent decisions in *Associated General Contractors, supra,* and *Blue Shield of Virginia* v. *McCready,* 457 U.S. 465, 73 L.Ed.2d 149, 102 S.Ct. 2540 (1982). In applying the five factors discussed in *Associated General Contractors,* to the factual circumstances presented in this case, the Court of Appeals erroneously concluded: (1) petitioners were only potential shareholders in a potential corporation and, therefore, their injury is indirect and raises problems of duplicative and overlapping damage theories because they had not formed a corporation to acquire Rogers *before* their opportunity was lost by reason of respondents' wrongdoing; and (2) respondents' wrongful actions in preventing the formation of binding contracts necessary for the Management Group to enter the market are irrelevant to the lower court's determination that the management group could not demonstrate antitrust injury because they lacked such necessary contracts.

This Court should review this case because (1) the Court of Appeals arrived at the foregoing conclusions on the basis of a blind and superficial analysis of the five factors discussed in *Associated General Contractors* without recognizing that such factors are for guidance purposes only; (2) there is a conflict in the circuits as to the application of *Associated General Contractors* under similar facts; and (3) as a result of the lower courts' rulings, an antitrust violation will go undetected and unremedied.

In urging that this case presents substantial questions as to the correct application of the principles of antitrust standing, petitioners do not contend that the five policy factors discussed in *Associated General Contractors, supra,* have no application in a given case. Petitioners do contend, however, that these factors should not be considered as so many shoes in which each litigant must perfectly fit in order to claim injury "in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).

In this case, the Court of Appeals applied the labels indirect injury," "complexity of damage calculations" and "risk of duplicative recovery" in concluding *sua sponte* that any cognizable injury was suffered by the corporation to be formed by the Management Group and the venture capital firms after agreement in principal had been reached and before closing. Having characterized the Management Group as prospective minority stockholders in a corporation to be formed, the Court erroneously applied the stockholder "derivative injury" rule that the to-be-formed corporation is the better plaintiff regardless of the fact that "[i]n the situation of a prospective stockholder, we do not have a plaintiff in existence that can readily and more efficiently bring the action." App. A, 26a.

Similarly, this case presents a substantial question in which there is conflict between the Circuits as to whether petitioners in order to maintain antitrust standing must

sue in the name of a corporation to-be-formed *plus* demonstrate the existence of a binding contract to acquire Rogers and binding financial commitments to finance that acquisition under circumstances where the antitrust violation itself prevents such a demonstration. In finding that petitioners must make such a demonstration regardless of the facts, the lower courts ignored the precedents of this Court's holding that Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions. See *Blue Shield of Virginia* v. *McCready*, and cases cited therein, *supra*, 457 U.S. at 472, 73 L.Ed.2d, 102 S.Ct. 2540.

Although this Court has never directly addressed the question of § 4 standing requirements for a potential competitor, lower courts have generally ruled that the antitrust laws protect the serious potential competitor as well as the established business. Otherwise "competition could be frustrated with impunity by established companies through the simple expedient of picking off and eliminating potential competition before it could reach the certification stage. [T]his would be at variance with the spirit and intent of the antitrust laws . . ." *Utah Gas Pipelines Corp.* v. *El Paso Natural Gas Co.*, 233 F.Supp. 955, 964 (D.Utah 1964).

The spirit and intent of the antitrust laws is to provide a remedy[1] to redress a wrong. In foreclosing a private remedy in damages when there is no one else available to deter respondents and deprive them of the fruits of their illegal actions, the lower court ignored this spirit and intent. This Court has always recognized that the lack of restrictive language in §4 "'reflects Congress' expansive remedial

[1] In a footnote to its opinion, the Court of Appeals refers to the possibility of injunctive relief "which has standing requirements less stringent than those under Section 4 of the Clayton Act." (See App A, 19a at fn.2.) This is an empty remedy indeed since as Ampco itself knew, divestiture is not an available remedy in private actions under § 16 of the Clayton Act, 15 U.S.C. § 26. *International Telephone and Telegraph* v. *GTE Corp.*, 518 F.2d. 913, 920 (9th Cir. 1975). See also, App D, 4d.

purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Blue Shield or Virginia* v. *McCready,* supra at 472, 73 L.Ed.2d 149, 102 S.Ct. 2540. By denying antitrust standing to the only "private attorney general" who had stepped forward,[2] after finding that "[t]here was evidence of the existence of a contract or conspiracy to monopolize or restrain trade in the potato processing market in the Pacific Northwest," the lower court has disregarded these fundamental antitrust precepts. App. A, 14a.

**1. The Policy Factors Justifying the General Rule Denying Antitrust Standing to Shareholders have No Application Where the Corporation has Not been Formed.**

***a. There was no more direct victim than the Management Group.***

As the Court of Appeals implicitly concedes, the general rule refusing antitrust standing to a stockholder for damage to his stockholder interest because of an antitrust injury to the corporation, is grounded on the fact that injury is indirect, i.e., the plaintiff is separated from the violator by one or more intermediate tiers of victims and hence, the corporation, as the direct victim, is the better plaintiff to bring the action. This underlying premise cannot apply here because there is no corporation separating the Management Group from the

[2] The governing four year statute of limitations, 15 U.S.C. 15(b), expired in the spring of 1983. Although respondents may urge that actual competitors or customers are available to vindicate the public interest in antitrust enforcement, that is not true. No one but the petitioners have sought to remedy the violation. Contrary to the result in *Associated General Contractors, supra,* "denying [the Management Group] a remedy in this case is . . . likely to leave a significant antitrust violation undetected or unremedied." 459 U.S. at 542, 74 L.Ed.2d 723, 103 S.Ct. 897. In its search for the best plaintiff, the lower courts have denied standing to the only plaintiff.

violator. The Management Group was a direct victim of the unlawful agreement which had as its purpose and effect, the elimination of a market disrupter and overcapacity producer.

The practical effect of the lower court's ruling is that a person will never be considered a serious potential competitor deserving of protection of the antitrust laws unless he first of all either (1) forms a corporation, or (2) has the financial wherewithal to be a 100% owner of the business entity, or (3) is able to convince all intended owners to join him in his suit. If petitioners had the benefit of the lower court's ruling before their elimination, they would have been well advised to form a corporation and issue the outstanding stock to themselves. Upon the infusion of additional equity by the venture capital firms, additional shares could be issued to reflect the respective ownership interests. To state this hypothetical situation is to underline the formalistic artificality of the lower court's reasoning. In interpreting antitrust laws, courts are not bound by formal conceptions of contract law. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 12 L.Ed.2d 98, 84 S.Ct. 1051 (1964). Rather courts must look at the economic reality of the relevant transactions and refuse to engraft artificial limitations on the § 4 remedy. *United States* v. *Phosphate Export Asso.*, 393 U.S. 199, 208, 21 L.Ed.2d 344, 89 S.Ct. 361; *Blue Shield of Virginia* v. *McCready, supra*, 457 U.S. at 472, 73 L.Ed.2d 149, 102 S.Ct. 2540.

The economic reality is that it was petitioner's very competition that Ampco was attempting to exclude. There was evidence in the record that one of the values to Ampco of acquiring Rogers was to eliminate an overcapacity producer and market disruptor in order to obtain market stabilization. Under these circumstances, who is the more direct target of the antitrust violation — the Management Group who had long functioned as the officers and key executives of Rogers or a yet unformed business entity which would have been created to acquire Rogers but for Ampco's acquisition of the Rogers potato division assets? It was the Management Group that necessarily set the policies that Ampco wanted to end — not an unnamed corporation that was never formed because

of the very antitrust violation complained of. In mischaracterizing petitioners' injury as indirect, the Court of Appeals has ignored a long line of Supreme Court precedent holding that when a person is the direct target of an anticompetitive act, he has standing to sue for injury to his business. See *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649-50, 23 L.Ed.2d 599, 89 S.Ct. 1871 (1969).[3]

***b. The factors of duplicative recovery, speculative harm and complex apportionment of damages have no application to petitioners' standing under § 4 of the Clayton Act.***

The Court of Appeals erroneously applied the factor of duplicative recovery enunciated in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 42 L.Ed.2d 707, 97 S.Ct. 2061 (1977). Plainly, this factor can have no application because the risk of duplication is non-existent. Not only is there no claim by the venture capital firms within the four year statute of limitations but also the Court of Appeals has held that these firms did not have the requisite intention to compete as of January 9, 1979 when the Management Group was eliminated as a prospective competitor. App A, 35a.

For the same reason, there is no practical possibility of overlapping damage theories. Although in theory there is

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[3] In *Perkins*, Perkins sued not only for damages to his two corporations — which had assigned their claims to him, see 396 F.2d 809, 813-14 (9th Cir. 1967) — but also for losses "that he as an individual has suffered . . . because the two failing Perkins corporations . . . were unable to pay him agreed brokerage fees . . ., rental on leases . . ., and other indebtedness." 395 U.S. at 649, 23 L.Ed.2d 599, 89 S.Ct. 1871." The Supreme Court reversed the Court of Appeals' ruling that these losses were too indirect to be "injuries" within the meaning of 15 U.S.C. § 15. "It is clear . . . that Perkins was no mere innocent bystander; he was the principal victim of the [antitrust violation]." *Id* at 649, 23 L.Ed.2d 599, 89 S.Ct. 1891. As this Court stated in *Associated General Contractors* supra, 459 U.S. at 537, n. 35, 74L.Ed.2d 723, 103 S.Ct 897: "Moreover, there no doubt are cases in which such an allegation [defendants' specific intent] would adequately support a plaintiff's claim under § 4. Cf. *Handler, supra*, n. 33, at 30 (specific intent of defendant to cause injury to a particular class of persons should "ordinarily be dispositive" in creating standing to sue) . . ." This is one of those cases.

often the possibility of overlapping damages, neither § 4 nor any decision of this Court requires a litigant to demonstrate the lack of such a possibility in order to maintain standing. To require otherwise would mean that a competitor seeking redress from a monopolist who has caused him injury, would be denied standing unless all similarly situated participants in the relevant market joined in the lawsuit. Otherwise, there would always be the possibility of overlapping and partially duplicative recoveries based on differing evidence and findings on such matters as (1) the size of the relevant market, (2) each competitor's share of the relevant market, and (3) projected losses to each firm attributable to the unlawful act.

The Court has never held that in order to maintain an antitrust claim, it is necessary that all competitors potentially injured by the unlawful violation, join in the litigation. Rather, this Court has always held that insofar as the amount of damage is concerned, an antitrust plaintiff need only provide a reasonable estimate of the damages stemming from an antitrust violation. See *Bigelow* v. *RKO Radio Pictures*, 327 U.S., at 266, 90 L.Ed. 652, 66 S.Ct. 574. "'Difficulty of ascertainment is no longer confused with right of recovery,'" *Id.* at 265, 90 L.Ed. 652, 66 S.Ct. 574, quoting *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 566, 75 L.Ed. 544, 51 S.Ct. 248 (1931), and "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," 327 U.S. at 265, 90 L.Ed. 652, 66 S.Ct. 574.

In this case, petitioners intended to present economic proof of damages measured by the estimated foregone income stream of Rogers and the resulting increase in the value of the Management Group's share of the total equity in the company. Management's share of the total equity was a minimum of 10%. Evidence of the reasonable expectancy of an additional percentage of "sweat" equity would also be presented to the jury. Although concededly, the percentage of Management equity above 10% cannot be established with

mathematical precision, such proof has never been required in antitrust cases. As this Court stated in *J. Truett Payne Co.* v. *Chrysler Motor Corp.*, 451 U.S. 557, at 566, 68 L.Ed.2d 441, 101 S.Ct. 1923 (1981], "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiffs' situation would have been in the absence of the defendant's antitrust violation."

Lack of certainty as to the percentage interest of the Management Group in this case is directly attributable to the wrongdoing of the defendants. Under guise of application of the "complex apportionment of damages" and "speculative nature of the harm" factors, the lower court has required certainty in proof of damages which this Court has never required. As this court made it clear in *McCready:*

> "...[t]he feasibility and consequences of implementing particular damage theories may, *in certain limited circumstances,* be considered in determining who is entitled to prosecute an action brought under § 4. *Where consistent with the broader remedial purposes* of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the need for 'massive evidence and complicated theories,' *where the consequence would be to discourage vigorous enforcement of the antitrust laws by private suits. Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra,* at 493, 20 L.Ed.2d 1231, 88 S.Ct. 2224...."

*Blue Shield of Virginia* v. *McCready,* 457 U.S. at 475, n. 11, 73 L.Ed.2d 149, 102 St. 2540 (emphasis supplied). Without regard to whether the Court of Appeals mistook uncertainty in proof of damages for complex apportionment of damages, that factor should not have been considered in this case because the broader remedial purposes of the antitrust laws and the vigorous private enforcement of the antitrust laws would be completely frustrated by a denial of petitioners' standing.

**2. Proof of the Existence of a Binding Purchase Contract and Binding Financial Commitments Should Not have been Required to Establish Antitrust Standing Under Circumstances where the Defendants' Wrongdoing has Aborted the Formation of Such a Contract and Binding Financial Commitments.**

Observing that there is no doubt that if the Rogers Management Team were existing competitors on the same level as Ampco, who were frozen out of a market by an antitrust violation, they would have standing to bring the treble damage action, the Court of Appeals concluded that it is the fact that the Management Group were not *existing* competitors at the time that creates the standing problem. App A, 21a-22a. The Court of Appeals accepted the trial court's finding that petitioners had demonstrated the necessary background and experience as well as affirmative action to engage in the proposed business — two of the four "*typical* factors which lower courts have considered *in varying combinations* to demonstrate intention and preparedness to enter the market . . ." See App. B, 22b. Nonetheless, the Court of Appeals concluded as a second independent basis for its affirmance of the trial court's summary judgment, that the Management Group lacked the preparedness to enter the market because they did not have a binding contract to acquire Rogers or the financial commitments for the financial resources to do so. (App A, 33a-36a.)

In requiring all four of the typical factors without regard to petitioners' evidence below that the very agreement in restraint of trade prevented the existence of binding contracts and financial commitments, the lower courts demonstrated a mechanical devotion to the application of labels mirroring the rote application of the five *Associated General Contractor* standing factors to the facts in this case regardless of their fit. Moreover, the Court of Appeals ignored its own jurisprudence that the four factors demonstrating preparedness are "typical" and should be considered "in varying combinations." App. A, 31a.

The lower courts failed to properly consider the evidentiary record conclusively demonstrating that financial commitments in the business world are not given until there is an agreement on principle as to price. This economic reality applies whether the circumstances involve financial commitments to a homeowner requiring an executed earnest money agreement or, as in this case, financial commitments by the banks and venture capital firms requiring a written agreement in principle as to price. In light of the evidentiary record below demonstrating that both the Management Group and the institutional equity investors were confident of the ability to finance the acquisition at a $13.5 million price, and as of January 9, 1979, had taken reasonable steps toward concluding that acquisition, the Court of Appeals failed to follow this Court's admonition that economic reality displaces formal conceptions in interpreting the antitrust laws. See *United States* v. *Phosphate Export Asso., supra, Simpson* v. *Union Oil Co., supra.*

**3. There is a Conflict Between the Fifth and Ninth Circuits on the Effect of an Antitrust Violation In Measuring Petitioners' Compliance with Antitrust Standing Requirements.**

Under similar facts, and in light of *Associated General Contractors,* the United States Court of Appeals for the 5th Circuit decided that the actions of the antitrust wrongdoer are relevant in measuring antitrust standing. *Industrial Inv. Development Corp.* v. *Mitsui & Co., Ltd.,* 704 F.2d 785 (5th Cir. 1983), reh. en banc denied, 709 F.2d 712 (5th Cir. 1983), cert. denied, ____ U.S. ____, 78 L.Ed.2d 337, 104 S.Ct. 393-94 (1983) *("Mitsui 2").* In that decision, the Fifth Circuit reaffirmed its former judgment reported at 671 F.2d 876 (1982) *("Mitsui 1")* which this Court vacated and remanded for further consideration in light of *Associated General Contractors.* 460 U.S. 1007, 75 L.Ed.2d 475, 103 S.Ct. 1244 (1983).

In *Mitsui 1,* the Fifth Circuit addressed both the shareholder "derivative injury" theory adopted by the Ninth Circuit *sua sponte* and the relevance of the defendant's

wrongful action in analyzing antitrust standing. Defendants in *Mitsui* argued that the American corporation and its two foreign subsidiaries could not allege that the defendants had conspired to destroy their rights to an Indonesian forestry concession because the parent corporation's only injury was as a potential shareholder of a never-formed Indonesian corporation. The *Mitsui 1* court expressly rejected this argument that an unformed corporation had the right of recovery rather than the prospective corporate shareholders:

> The situation is vastly different when defendants' own actions are alleged to have aborted the entity which defendants claim as sole standing to sue. The antitrust standing inquiry is not a search for labels; it is a search for the most direct targets of the anti-competitive acts [citations omitted]. . . There was no more direct target of defendants' alleged activity than [plaintiff]. Since the joint venture corporation was never formed, there is no possibility of double recovery. We hold that [plaintiff] has standing to challenge the alleged restraint in the harvesting business. [footnote omitted]

*Id.* at 671 F.2d 876-887.

On remand by this Court for reconsideration in light of *Associated General Contractors, supra*, the court in *Mitsui 2* evaluated the plaintiff's harm, the alleged wrongdoing by the defendants and the relationship between them on the basis of this Court's explication of relevant factors in *Associated General Contractors*. In reaffirming *Mitsui 1* the Court of Appeals reasoned:

> Plaintiffs allege a direct injury because they say not that they lost a purchase because of competition but that defendants conspired to disrupt their joint venture with Telega Mas, to prevent their entry into competition with a potential American competitor, and thereby to deprive them of business profits because of the loss of that competitive position and opportunity. *By denying their source of supply, defendants are alleged to have deprived plaintiffs of the means for their competition with the defendant in the importation of lumber products into the*

> United States. There is no question of duplicate recovery or complex apportionment of damages in this case. Plaintiffs' allegations in the summary judgment record meet the requirements of *Associated General Contractors.*

704 F.2d 785, 786 (emphasis supplied).

There is a direct conflict between the Fifth Circuit's *Mitsui* decisions and the Ninth Circuit's opinion below on the issues of both standing of a shareholder in a to-be-formed corporation and the relevance of the January 9, 1979 acquisition of Rogers by a monopolist to eliminate an over-capacity producer and market disruptor and promote market stabilization. The unlawful act prevented the formation of a binding contract to acquire Rogers and the necessary financial commitments — the very *indicia* of preparedness required by the lower courts in this case to demonstrate injury to a petitioner's business as a potential competitor. The Court should grant this writ to resolve this conflict between the circuits and address this important issue.

## CONCLUSION

This Court should grant the writ of certiorari to address the substantial questions of antitrust standing discussed infra. In requiring that antitrust plaintiffs fit perfectly within the lower court's subjective and superficial analysis of each of the five factors discussed in *Associated General Contractors, supra*, the Court of Appeals has disregarded the broader remedial and enforcement purposes underlying § 4 of the Clayton Act as expressed and emphasized by this Court's consistent decisions since the Sherman Act was enacted in 1890. This case presents an opportunity to restate those principles in light of *Associated General Contractors* to give necessary guidance to the courts and private antitrust litigants.

DATED this 24th day of April, 1985

Respectfully submitted,

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# APPENDIX A

Ronald O. BUBAR, Donald J. Nowatski, William M. Barth, Charles W. Houpt, John J. Netterberg, and James F. Palo, Plaintiffs-Appellants,

v.

AMPCO FOODS, INC., a California corporation; Alexander & Baldwin, Inc., a Hawaii corporation; and Rogers Foods, Inc., a Delaware corporation, Defendants-Appellees.

NO. 82-3539

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

Argued April 8, 1983.

Submitted Nov. 7, 1983.

Decided Jan. 25, 1985.

Before HUG, POOLE, and NORRIS, Circuit Judges.

HUG, Circuit Judge:

This suit was brought for a reach of contract and also for treble damages for

violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1982). The district court, 539 F.Supp. 535 (1982), granted summary judgment on the contract claim on the ground that there had been no contract formed, and on the antitrust claims on the ground that the plaintiffs lacked standing. The plaintiffs appeal only the portion of the summary judgment denying the antitrust claims. Thus, the sole issue before us is whether the plaintiffs have standing to sue for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982).

FACTS

We conduct a de novo review of a summary judgment to determine if there is a genuine issue of material fact and, if not, whether the prevailing party is entitled to judgment as a matter of law.

Chelson v. Oregonian Pub. Co., 715 F.2d 1368, 1370 (9th Cir. 1983). In reviewing the evidence, we view it in the light most favorable to the losing party. Id. There had been considerable discovery prior to the motion for summary judgment, with depositions taken of all of the principal persons participating in the transactions. The testimony we refer to in relating the facts is taken from the depositions. Viewing the evidence in the light most favorable to the appellants, the record reveals the following: Plaintiffs Bubar, Nowatzki, Barth, Houpt, Netterberg, and Palo are former management employees of Rogers Foods, Inc., a corporation that processed potato, onion, and garlic products. Rogers Foods ("Rogers") was a wholly-owned subsidiary of Alexander & Baldwin, Inc. ("A & B"). Ampco Foods, Inc. ("Ampco") was a prime

competitor of Rogers in the processed potato market in the Pacific Northwest.

In the summer of 1978, A & B decided to divest itself of certain holdings, including its subsidiary, Rogers. The plaintiffs, who were the top management of Rogers, ("the management group"), became interest in purchasing Rogers themselves, if financing could be obtained and if adequate terms of purchase could be obtained from A & B. In the early fall, they informed the A & B management of their desire to purchase and were informed that A & B would look favorably on the possibility of selling to the plaintiffs. The management group then began investigating possible sources of debt and equity capital.

In November of 1978, Ampco also became interested in purchasing Rogers, and met with A & B representatives to

discuss a possible purchase. The course of negotiations between A & B and the two prospective purchasers may be summarized as follows: In mid-November, the management group made a proposal to acquire all the stock of Rogers for $10 million. A & B responded that the figure was too low, but that Rogers could be acquired for $15 million. On or about December 4, 1978, the management group proposed $12.5 million as the acquisition price for the stock. A & B responded that this was still too low.

On December 15, 1978, Ampco made a proposal to purchase the assets of only Roger's potato division for $10 million. This would leave A & B with the onion and garlic divisions. On December 28 or 29, after receiving this offer from Ampco, A & B telephoned the management group and proposed a sales price for Rogers of

$13.5 million. At this time, all of the proposals were preliminary negotiations, with no firm offers having been made. A & B also had received expressions of interest from other prospective purchasers.

The management group was informed that representatives of A & B would be meeting with other prospective purchasers during the week of January 8, 1979. The management group agreed to meet with A 7 B on January 9, 1979.

During this period of negotiations, the management group had held discussions with several venture capital organizations, seeking their participation as equity investors, and also had held discussions with several banks concerning a line of credit for operating expenses. No firm commitments had been made.

On January 8, 1979, the prime movers of the management group, Bubar, the President, and Nowatzki, the Vice President for Finance, met with representatives of three venture capital organizations, First Capital Corporation of Chicago, Security Pacific Capital Corporation and Seidler, Arnett and Spillane, with whom they previously had discussed this project. The purpose of the meeting was to develop the proposals to be discussed with A & B and to determine how the $13.5 million purchase price could be funded.

In previous discussions, A & B had indicated that it would accept certain of Rogers's assets as part payment. There was a receivable for flood damage worth $3.5 million and a sale and lease-back transaction with Lamb Weston, that would result in $6.2 million in cash. Thus,

$9.7 million of the $13.5 million price could be paid by transferring these assets of Rogers to A & B. This left a balance of $3.8 million that the purchaser would have to provide. In his deposition, Bubar testified that it was contemplated that money would be provided as follows: The members of the management group would invest $50,000 each, for a total of $300,000. First Capital and Security Pacific were to invest $2.7 million. The balance of $800,000, it was thought, could be obtained from a bank loan. In preliminary discussions with the equity investors, it was agreed that an $8 million line of credit with a bank would be required. Discussions had been held with several banks who had expressed interest, but no commitments had been made. At the January 8, 1979 meeting, it was proposed that perhaps $800,000 of

this line of credit could be used to fund the balance of the purchase. Seidler, Arnett and Spillane's participation was to involve service rather than financial investment.

The lead equity investor was to be First Capital, which was represented by Edward Smith. At his deposition, Smith testified that it was contemplated that First Capital would invest $1.7 million and Security Pacific, $1.3 million. This would result in $3 million from the venture capital groups, an increase of $300,000 over the $2.7 million that Bubar had mentioned. However, Smith also testified that there was doubt about Security Pacific's participation because of the difficulty he had in working with Stevens, the representative of Security Pacific.

Smith also testified at his deposition that the manner in which the acquisition would be made would be to form a new corporation that would acquire either the assets or the stock of Rogers. The percentage of stock ownership each investor was to have and the voting control of the new corporation had not been determined, and the depositions revealed widely different expectations. The management group was to invest about one-tenth of the equity capital. It was not determined what percentage of the stock they would receive. Discussions with Smith, however, had indicated that they would initially receive at least ten percent, but might receive an additional ten to fifteen percent, either initially or to be earned by the management group over a period of time as additional compensation. Smith stated that because

both First Capital and Security Pacific were Small Business Investment Companies and governed by certain banking regulations, it would be necessary to pout the voting control in the hands of Seidler, Arnett and Spillane, either through the mechanism of a voting trust or through the issuance of voting and non-voting stock. Seidler, Arnett and Spillane were requesting two percent of the stock and $100,000 to perform this service. The management group was resistant to this idea, and to Seidler, Arnett and Spillane's participation, and had not as yet agreed to it.

On January 9, 1979, Bubar and Nowatzki from the management group and Smith from First Capital met with Evans of A & B to discuss the possible purchase. No representative from Security Pacific or Seidler, Arnett and Spillane

was present. Bubar said his group would pay $13.5 million for Rogers, but asked for an additional 120 days to complete financial arrangements because the major portion of the equity capital was being provided by venture capital organizations. These organizations were required by their internal guidelines to send representatives to examine Rogers's books and substantiate the figures and present the investment proposal to their investment committees. When Evans replied that the time was too long, Smith stated that they would be able to make a decision in six weeks. Evans declined to give the group an exclusive status as the only party with whom A & B would negotiate during this period. At the end of the meeting, Evans informed the group that he would speak by phone with the president of A & B and get back to them later. No

written agreements or letters of intent were signed and no oral commitments to buy or to sell were made.

Later that day, Evans met with representatives of Ampco. On that afternoon and during the course of the next two days, A & B agreed to sell the assets of the potato division to Ampco for $11,350,000. Evans so informed the management group. The onion and garlic divisions of Rogers were later sold to another organization.

On January 29, 1979, the Justice Department commenced an investigation of the transaction. A & B told Bubar, Nowatzki, and others in the management group to cooperate fully. They did so and met with Justice Department attorneys and provided statements and documents. The Justice Department announced on March 13, 1979 that it would not chal-

lenge the transaction. The sale to Ampco closed on March 15, 1979. The management group subsequently brought this action.

The district court determined that there was a genuine issue of material fact concerning the existence of violations of sections 1 and 2 of the Sherman Act by A & B and Ampco. There was evidence of the existence of a contract or conspiracy to monopolize or restrain trade in the potato processing market in the Pacific Northwest. The district court, however, granted summary judgment on the ground that these plaintiffs, the management group, did not have standing to bring a private treble damage action for injury resulting from the antitrust violation. Thus we are concerned in this appeal solely with the question of whether the plaintiffs, the management

group, are proper parties to bring a private treble damage action.

ANALYSIS

[1] Section 4 of the Clayton Act allows recovery of treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). Although the language of section 4 is very broad, Congress did not intend to provide a private remedy for all injuries that might conceivably be traced to an antitrust violation. Blue Shield of Virginia, Inc. v. McCready, 457 U.S. 465, 472-80, 102 S.Ct. 2540, 2545-49, 73 L.Ed.2d 149 (1982). Accordingly, the courts have limited the ability of injured parties to recover under the Clayton Act through the creation of restrictions on standing. This doctrine of antitrust standing requires

an inquiry beyond that performed to determine standing in the constitutional sense. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 535 n. 31, 103 S.Ct. 897, 907 n. 31, 74 L.Ed.2d 723 (1983). This determination of antitrust standing requires an evaluation of the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between them. Id. 459 U.S. at 535, 103 S.Ct. at 907; Chelson v. Oregonian Pub. Company, 715 F.2d at 1370.

The Supreme Court likened the attempt to find a precise test of the

limits of when a party injured in some way by an antitrust violation may recover treble damages in a private action to the struggle of judges to articulate a precise definition of the concept of proximate cause. The Court noted that various circuit court decisions had developed a "direct injury" test, a "target area" test, and a "zone of interest" test, but observed that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." Associated General Contractors, 459 U.S. at 536 & n. 33, 103 S.Ct. at 908 & n. 33. The Court cautioned that the use of these labels may lead to mechanical application and direct attention away from the policy

factors discussed in its opinion.[1] The factors mentioned by the Court are:

(1) the nature of the plaintiff's alleged injury - whether it was the type the antitrust laws were intended to forestall,

(2) the directness of injury,

(3) the speculative measure of the harm,

(4) the risk of duplicative recovery, and

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1. For a discussion of the policy factors mentioned by the Supreme Court, see Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739 (9th Cir. 1984); Industrial Inv. Development Corp. v. Mitsui & Co., Ltd., 704 F.2d 785, 786 (5th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 393-94, 78 L.Ed.2d 337 (1983); Antitrust Standing After Associated General Contractors: The Issue of Employee Retaliatory Discharge, 63 Boston U.L.Rev. 983 (1983).

(5) the complexity in apportioning damages.

459 U.S. at 538-45, 103 S.Ct. at 908-13.

It should be noted that treble damage action is not the only way that an antitrust violation can be challenged. The Government can, of course, challenge the action but, in addition, private parties can bring equitable actions.[2]

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2. An equitable action to enjoin the activity can be brought under Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), which has standing requirements less stringent than those under section 4 of the Clayton Act. Equitable relief is available under section 16 of the Clayton Act to those with "threatened loss or damage" without the limitation that the injury to be "business or property," as required by section 4. 2 P. Areeda & D. Turner, Antitrust Law § 335e (1978). Furthermore, there are no complex issues of damages or speculative or duplicative recovery problems. "[S]tanding to enjoin an antitrust violation is and should be more readily accorded than standing for treble damage purposes." Id. We need not decide whether the plaintiffs in this action would have had standing under section 16, because no such relief was sought.

[2] It is apparent that determination of standing is a question of law, defining the limits to which private treble damage actions may be brought for injuries caused in fact by the violation of the antitrust laws. John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498 (9th Cir. 1977). This is to be distinguished from the questions of fact that a plaintiff would ultimately have to prove in order to establish his case, such as an antitrust violation, his injury, and the amount of damages. Once the plaintiff is found as a matter of law to be a proper plaintiff to bring the action or, in other words, to have antitrust standing, then the plaintiff can proceed to present the evidence on these questions of fact necessary to carry his burden of proof. The legal question at the outset

is whether the plaintiff, even though he can show some injury caused in fact by an antitrust violation, has standing to bring a private treble damage action for this injury. Thus the courts must, on a case-by-case basis, define the legal limits of the remedy by applying the policy factors enumerated by the Supreme Court.

The plaintiffs in this case allege that they were potential competitors who were frozen out of the processed potato market by Ampco by a contract, combination, or conspiracy with A & B in violation of sections 1 and 2 of the Sherman Act. We assume the existence of the antitrust violations, because the district court found that genuine issues of material fact justify a trial on this issue.

There is no doubt that if the plaintiffs were existing competitors on the same level as Ampco, who were frozen out of a market by an antitrust violation, they would have standing to bring the treble damage action. It is the fact that they were not existing competitors at the time that creates the standing problem. The nature of the problem is well stated in 2 P. Areeda & D. Turner, Antitrust Law § 335c, at 174:

> Because it is as unlawful to prevent a person from engaging in a business as it is to drive him from it, the courts are sometimes faced by the plaintiff who is not "in" business but who claims that he would have been. The policy dilemma is clear. Antitrust policy seeks to compensate the person wrongfully excluded from

> the market with treble damages that punish the wrongdoer. On the other hand, the infinite universe of possible entrants and plaintiffs may seem unduly large; and the variety and force of other factors affecting one's actual entry and his subsequent prosperity make very speculative the connection between the defendant's violation and the plaintiff's claimed injury. (Footnote omitted.)

Although some courts have required that the plaintiff have an existing business or property interest, our circuit, along with most circuits, has held that a potential competitor has standing if he can show a genuine intent to enter the market and a preparedness to do so.

Solinger v. A & M Records, Inc., [Solinger I], 586 F.2d 1304, 1309-10 (9th Cir. 1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979); see Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 475 (7th Cir. 1982), cert. denied, 461 U.S. 958, 103 S.Ct. 2430, 77 L.Ed.2d 1317 (1983).

In this case, there is no doubt that the plaintiffs intended to enter the market. The question is plaintiffs' preparedness to do so. Before we consider the issue of preparedness, we must first examine the question of whether the plaintiffs should be considered the potential competitor. Actually, the potential competitor was the corporation that the plaintiffs intended to form with the three venture capital organizations in which the plaintiffs were to be ten to twenty-five percent stockholders.

POTENTIAL STOCKHOLDER

[3] It generally has been held that a stockholder does not have standing to sue for damage to his stockholder interest because of an antitrust injury to the corporation. Solinger v. A & M Records, Inc. [Solinger II], 718 F.2d 298, 299 (9th Cir. 1983); 2 P. Areeda & D. Turner, Antitrust Law § 336d, at 180. The reasons for this are, first, that the injury is indirect. The corporation is the better plaintiff to bring the action. The relative damage to the stockholder is then resolved and remedied within the corporate structure. The diminution of stock value or dividends to the stockholder is remedied by a corporate recovery. Furthermore, it is the corporate claim and the corporate decision as to whether to bring suit, how to conduct it,

and whether to settle it, as determined in the best interests of the corporation. This, of course, would be subject to a possible derivative suit if the directors breached their fiduciary duty in failing to pursue the claim. Moreover, the complexity of the determining damages and the risk of duplicative recovery is significantly increased. There would be problems of determining the effect of various stock rights and the amount of the recovery that would flow through to the stockholders, either by increase in dividends or stock value. There would frequently be a multiplicity of plaintiffs and the difficulty of computing damages to a stockholder that would not become duplicative when other stockholders sued.

We must consider if these same considerations pertain when the plaintiffs are prospective stockholders in a corporation yet to be formed. In the situation of the prospective stockholder, we do not have a plaintiff in existence that can readily and more efficiently bring the action. Even so, we stated in Solinger II, 718 F.2d at 299, "A shareholder of a corporation injured by antitrust violations has no standing to sue in his or her own name, and a fortiori, a prospective shareholder ordinarily would have no standing." We did not preclude all prospective shareholder actions, but noted that ordinarily that result would follow. Here, also, we need not determine whether, in every case, a potential stockholder in a corporation tc be formed to compete in a

market would lack standing. For example, a situation in which a person had all the resources to enter a market and intended to form a solely-owned corporation rather than an individual enterprise would involve different policy considerations and would not involve some of the standing problems enumerated above.

In this case the fact that the corporation had not been formed and that it had not been determined who all of the stockholders were to be, what the percentage of ownership was to be, what the stock rights were to be, and when or if additional stock was to be issued to the management group, magnifies the problems with regard to the complexity of damage calculations and the risk of duplicative recovery.

The management group sought to bring together several equity investors, who would form a corporation with it to acquire the assets of Rogers and compete in the processed potato market. No determinations of percentages of stock ownership were made. The plaintiffs expected to provide about ten percent of the equity capital requirements, although the amount was uncertain. They expected to receive somewhere between ten and twenty-five percent of the stock, according to Pubar. Some of the other members of the management group testified in their depositions that they expected the management group would receive larger percentages. It had been discussed that perhaps any amount over ten percent would be earned over a period of time. No determination had been made as to whether

this would be done and, if so, whether it would be through stock options or stock bonuses, or over what period of time this was to take place. All of this would make it difficult to determine what portion of a corporate damage award would accrue to these potential stockholders. The participation of the venture capital group was in doubt, as will be discussed in the next section. Thus, the uncertainties involved in the fact that the corporation was not in existence and the eventual ownership of the stock unknown, would greatly increase the complexity of determining damages and the risk of duplicative recovery.

[4] In summary, the policy reasons why a stockholder is not permitted standing to sue for antitrust injury to the corporation are, in this case,

greatly magnified when we have as plaintiffs potential stockholders of some amount between ten and twenty-five percent of the shares seeking treble damages for injury to their potential stockholder interest in a corporation yet to be formed, where the relative rights of these and other stockholders have not been agreed to by the potential investors. For this reason alone, it would seem the management group members are not proper plaintiffs to bring a private treble damage action. This becomes even more apparent when we consider the stage of preparedness of the management group and others to enter the market as competitors.

PREPAREDNESS

The grounds upon which the district court based its summary judgment was the

lack of preparedness to enter the market because plaintiffs did not have a binding contract to acquire the assets they needed or the reasonable likelihood of producing the financial resources to do so. In Solinger I, 586 F.2d at 1310, we discussed some typical factors that the courts have considered in varying combinations to demonstrate intention and preparedness to enter the market. We enumerated these typical factors as follows:

1. The background and experience of plaintiff in his prospective business,
2. Affirmative action on the part of plaintiff to engage in the proposed business,
3. The ability of plaintiff to finance the business and the

purchase of equipment and facilities necessary to engage in the business, and

4. The consummation of contracts by plaintiff.

Id. Similar factors have been enumerated by other courts.[3]

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3. See Hecht v. Pro-Football, Inc., 570 F.2d 982, 994 (D.C. Cir. 1977), cert. denied, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978), wherein the court stated:

> Indicia of preparedness must include adequate background and experience in the new field, sufficient financial capability to enter it, and the taking of actual and substantial affirmative steps toward entry, "such as the consummation of relevant contracts and procurement of necessary facilities and equipment." (Footnotes omitted.)

All agree that the only way the management group could have become a competitor was to acquire Rogers or its assets. The first obstacle to establishing preparedness is that the management group did not have a binding contract to acquire the assets necessary to compete. The management group asserts that this should not be a factor because the contract that was necessary was to be made with one of the alleged antitrust conspirators. Yet, on the other hand, when our inquiry at this stage of the proceeding is one of standing, and one element is to determine how close the management group was to becoming a competitor, the lack of a contract to obtain the assets necessary to compete is surely a relevant factor, as the district court properly determined. Assume for a moment that the assets that the manage-

ment group sought to acquire were owned by someone other than A & B, and that A & B and Ampco engaged in an antitrust violation by conspiring to restrain trade or monopolize through the sale of Rogers to Ampco. If the assets were to be acquired from the third party, there is no doubt that this would be a highly relevant factor and, for the purposes of the standing inquiry, we find it relevant here.

The second factor stressed by the district court is the lack of a showing of the financial resources to complete the purchase. The management group speaks as though it was a question of whether the management group ultimately could obtain loans to acquire Rogers. This mischaracterizes the situation. The management group intended to invest $300,000, which they had not as yet

raised among their six members, as equity capital. It was incumbent that the balance of the necessary $3.8 million be obtained from the venture capital groups. There is no contention that the management group intended to borrow, or could have borrowed, the remaining $3.5 million to acquire the stock or assets of Rogers. These major equity participants had not committed themselves as potential purchasers. With this lack of a definite intent to become competitors, it is clear that these potential seventy-five to ninety percent stockholders in the corporation would not themselves have standing to bring this treble damage action. It would be a most peculiar result to hold that the potential ten to fifteen percent stockholders in the corporation do have standing to assert

claims from the damages to the same potential corporation.

The management group contends that there is a genuine issue of fact as to whether they and the venture capital groups eventually could have agreed among themselves on the corporate structure and produced the required $3.8 million. However, there is no genuine issue of fact as to the state of their preparedness at the time of the alleged antitrust violation. Their status as prospective stockholders, the lack of commitment of the venture capital groups, and the other uncertainties are undisputed. We must determine from these facts whether as a matter of law the plaintiffs have standing to bring the action.

POLICY FACTORS

[5] We will summarize the standing considerations in light of the factors the Supreme Court has deemed important.

1. The nature of the plaintiff's alleged injury - whether it was the type of injury the antitrust laws were intended to forestall. If, in fact the plaintiffs were potential competitors prepared to enter the market and were frozen out of the market, this would be the type of injury the antitrust laws were intended to forestall. However, the corporation was the potential competitor and there was serious doubt as to its preparedness to enter the market.

2. Directness. These plaintiffs were potential ten to twenty-five percent stockholders in a corporation yet to be formed that was to be the competitor in the market. The injury would be to the

corporation and only indirectly to the stockholders. The general rule that a stockholder may not sue for the antitrust damage to the corporation seems especially applicable in this case.

3. Speculative nature of the harm. Because the corporation was only a potential competitor, the speculative nature of the harm is increased because of the uncertainty that it would ever have been financially able to become a competitor. The speculative nature of the harm is further increased because the plaintiffs were only prospective minority shareholders in the corporation that was to be the competitor, and the distribution of the stock and of the relative stock rights was uncertain.

4. Complexity of apportioning damages and the risk of duplicative recovery. Because the percentage inter-

est of the stockholders of the potential corporate competitor was uncertain, the assessment of damage to the stockholder interest of the management group would be complex and leave the possibility that other potential stockholders could claim damages to their stockholder interest. This would result in duplication of recovery - for example, if the management group claimed twenty-five percent interest in one suit and the remaining potential stockholders claimed a ninety percent interest. There would not, of course, be the same magnitude of problem as in some instances when the claims of injury are by persons at different levels and in different capacities in the economy. Here we would be seeking only to apportion among stockholders the damage suffered by a corporation. But the fact that the composition of the

corporation was unknown, and the percentage of stockholdings and relative rights of the potential participants remained uncertain, would create very real problems in apportioning damages.

OTHER PRECEDENT

The management group relies heavily upon our decision in Helix Milling Company v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975), cert. denied, 423 U.S. 1053, 96 S.Ct. 782, 46 L.Ed.2d 642 (1976). Helix was a competitor in the flour market in the Pacific Northwest. Its mill was destroyed by fire and it alleged that its only way of continuing in the milling and sales business was to acquire the assets of an existing mill in the Pacific Northwest. Helix approached General Foods with an offer to purchase its Pendleton, Oregon mill,

which General Foods had indicated it desired to sell. Terminal Flour Mills, a major competitor in the market, approached General Foods and ultimately obtained a contract to purchase the mill. Helix filed an antitrust suit to enjoin the acquisition and for treble damages. We held that Helix had a viable claim for treble damages under section 1 of the Sherman Act. The question of standing was not raised, as such, in that case. Implicitly, however, we found standing.

The Helix case is superficially similar to this case in that Helix did not have a binding contract to purchase the mill. However, it varies in many other significant ways from this case. Helix was an existing competitor in the market, though temporarily disabled from competing. An actual offer had been made by Helix to acquire the mill and there

was apparently no question raised about its financial ability to purchase the mill. This is in contrast to the present situation, in which no firm offer was made and financial ability was in doubt. Helix was the actual corporate competitor seeking reentry into the market not a minority stockholder in a prospective corporate competitor seeking to enter. Nor were uncertainties of damage calculation or apportionment among stockholders present in Helix. The policy factors favoring Helix's standing as a proper plaintiff to bring a treble damage action are much more evident than in this case.

CONCLUSION

Plaintiffs were potential minority stockholders in a corporation yet to be formed, which sought to enter the pro-

cessed potato market. The venture capital groups who were to be the seventy-five to ninety percent stockholders had not determined whether they were going to invest in the project. Even with the prospective participation of the venture capital groups, another $500,000 to $800,000 would yet have to be raised, either by debt or additional equity financing, and there were no commitments for such financing. The plaintiffs never had a binding contract or commitment or option to acquire the assets necessary to enter the market. We agree with the district court that the plaintiffs in this posture did not have standing to bring this private treble damage antitrust action.

AFFIRMED.

APPENDIX B

Ronald O. BUBAR, Donald J. Nowatski, William M. Barth, Charles W. Houpt, and John J. Netterberg, Plaintiffs,

v.

AMPCO FOODS, INC., a California corporation; Alexander & Baldwin, Inc., a Hawaii corporation; and Rogers Foods, Inc., a Delaware corporation, Defendants.

and

James F. PALO, Intervenor-Plaintiff.
Civ. No. 80-1010.

United States District Court,
D. Idaho.

May 21, 1982.

MEMORANDUM OPINION

RYAN, District Judge.

This case is properly before the Court on Defendants' Motions for summary judgment.

Plaintiffs, former officers or employees of Defendant Rogers Foods, Inc., have brought suit against Rogers, its sole shareholder, Alexander & Baldwin, Inc., and Ampco Foods, Inc., alleging that the Defendants violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) by entering into an agreement for the sale of Rogers' assets to Ampco. Plaintiffs also allege that Alexander & Baldwin had previously entered into a contract to sell Rogers to Plaintiffs, that Ampco knew of that agreement, and that Alexander & Baldwin's sale of Rogers' assets to Ampco constituted common law contract breaches. Plaintiffs seek to recover treble damages against Defendants pursuant to 15 U.S.C. Section 15.

Plaintiffs' Complaint charges that because of the combination and contract

of sale which resulted in Ampco acquiring the potato division of Rogers, its alleged principal competitor in the market for fresh and processed potatoes in Eastern Idaho and the Columbia Basin of the States of Oregon and Washington, Plaintiffs have been excluded from entry into this market, and that Defendants' activities have resulted in their illegal monopolization of trade and commerce. Defendants Alexander & Baldwin and Rogers Foods assert that they are entitled to summary judgment in this action on two grounds: First, that there is no basis in fact or law for Plaintiffs' contract claim against those Defendants, and secondly, that there is no basis in fact or law for the Plaintiffs' antitrust claim against those Defendants.

Defendant Ampco Foods, Inc., asserts that it is entitled to summary judgment

in this action on the antitrust grounds only, since there is no contractual complaint against Defendant Ampco Foods.

Substantial discovery has been conducted in this action and both Plaintiffs and Defendants have set forth for this court detailed statements of facts. (Memorandum of Defendants Alexander & Baldwin, Inc., and Rogers Foods, Inc., in support of Motion for summary judgment, pp. 3-7, and Plaintiffs' Memorandum in opposition to Defendants' Motion for summary judgment, pp. 2-14.) The Court believes that the following recitation of material facts, based upon those detailed submissions, facilitates an understanding of the legal analysis below.

In the summer of 1978, Alexander & Baldwin determined that it would sell off a number of its assets, including Rogers Foods. Plaintiffs Bubar, then Rogers'

President, and Nowatzki, then its Vice-President/Finance, concluded after their first meeting with Alexander & Baldwin's chief executive officer, Gilbert Cox, in July 1978, that Alexander & Baldwin intended to sell Rogers or its assets. On behalf of themselves and other members of Rogers' management, Plaintiffs began to investigate whether they could secure financing to purchase Rogers Foods. For the next several months Plaintiffs spoke to a number of venture capitalists and bankers in an effort to locate financing. Plaintiffs did not secure a written agreement from any financial institution or venture capital supplier for any investment arrangement respecting a proposed purchase of Rogers. On November 13, 1978, Alexander & Baldwin publicly announced its divestiture plans. Ampco Foods first heard that Rogers Foods

might have been for sale in late October 1978. Representatives of Alexander & Baldwin, Ampco Foods, and Ampco's investment bankers met to discuss a possible sale of Rogers for the first time on November 16, 1978. On December 15, 1978, Ampco offered $10 million for Rogers' potato division assets. Alexander & Baldwin rejected that offer. During these months other companies contacted Alexander & Baldwin regarding their interest in acquiring Rogers' assets.

Throughout November and December 1978, Plaintiff Bubar asked the representatives of Alexander & Baldwin about a possible price for Rogers. In late December, Alexander & Baldwin responded to Bubar's request for a price with a figure of $13.5 million. The Plaintiffs were informed that Ray Evans, Alexander & Baldwin's Vice-President/Finance, would

be meeting with other interested purchasers during the week of January 8, 1979. Bubar and Evans agreed to meet on the morning of January 9, 1979.

Throughout the fall and early winter of 1978, the Plaintiffs were involved in discussions with various financial institutions relative to financing the purchase of Rogers. Although no financial institution was prepared to make a final commitment of funds to the project until a firm price for a company had been established, and agreement reached with Alexander & Baldwin, the banks and equity capital organizations that examined the proposed purchase were uniformly enthusiastic. By January 8, 1979, First Capital Corporation, the equity arm of First National Bank of Chicago, and Security Pacific Venture Capital Corporation, an affiliate of the Security

Pacific Bank, had together determined that an investment of $2.7 million in equity funding toward Plaintiffs' venture was appropriate, subject to their own internal guidelines which required time to examine the books of Rogers Foods and to be able to substantiate the figures that had been supplied them.

On January 9, 1979, Mr. Evans; Jerome McLaughlin, Alexander & Baldwin's General Counsel; and Mike Ulyshen, Alexander & Baldwin's Executive Vice-President, met with Plaintiffs Bubar and Nowatzki, and Edward Smith, a representative of First Capital Corporation. Mr. Bubar stated that his investment group would pay $13.5 million for Rogers Foods and the parties discussed various other terms of purchase and options to purchase. Mr. Bubar, on behalf of the Plaintiffs, requested 120 days to consum-

mate the purchase, and asked that during such time the management group be awarded exclusive status and be the only party with whom Alexander & Baldwin would negotiate. At the end of the meeting, Mr. Smith estimated that the chances of putting together a deal were 80 percent plus. However, as the meeting ended, Mr. Evans informed the Plaintiffs that he would talk on the telephone with Mr. Cox and would get back to Mr. Bubar later that day. During the evening of January 9, 1979, Mr. Evans informed Mr. Bubar that Alexander & Baldwin had decided to sell the potato division assets to Ampco.

Plaintiffs have asserted that there was an oral agreement struck at the January 9, 1979, meeting. However, Plaintiffs concede that there was never a written contract for the Plaintiffs to

buy Rogers Foods from Alexander & Baldwin.

The Defendants assert that their Motions for summary judgment should be granted on the following grounds:

(1) There never was a contract for sale of Rogers' stock to Plaintiffs;

(2) Plaintiffs' contract claim is barred by the statute of frauds;

(3) Plaintiffs lack standing to sue for damages under the antitrust laws; and

(4) There is no evidence of an antitrust conspiracy.

[1] Initially, the Court will consider the issue of whether Plaintiffs lack standing to sue for damages under the antitrust laws since a consideration of that issue incorporates the other grounds asserted by Defendants in their Motions for summary judgment. Addition-

ally, standing is a question of law for the Court to determine since Plaintiffs' claim may be dismissed for lack of standing as a matter of law. John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977).

[2] The Plaintiff's statutory basis for bringing this private antitrust action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, is found in Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The Ninth Circuit has developed a three-part test to be used by this Court in determining the Defendants' challenge to the Plaintiffs' standing to sue for

damages under the antitrust laws. Plaintiffs must satisfy each of the three parts of that test to have standing to sue for damages under the antitrust laws. Since the Defendants' challenge is made at the summary judgment stage of this proceeding, the Court must construe the facts in the light most favorable to Plaintiffs, and determine whether there is a genuine issue of material fact and whether the Defendants are entitled to a judgment as a matter of law as to each of the three parts of this test.

The three-part test is essentially: (1) Whether Plaintiffs have sufficiently alleged an antitrust type violation under Sections 1 and 2 of the Sherman Act; (2) whether Plaintiffs have stated facts sufficient to support their allegations that they have sustained injury to their business or property due to the antitrust

type violation; that is, whether Defendants factually caused Plaintiffs' injury; and (3) whether the Plaintiffs' injury falls within the core of Congressional concern underlying the substantive provisions of the antitrust laws allegedly violated, Sherman Act Sections 1 and 2; that is, whether the Defendants legally caused Plaintiffs' injury. See generally, Solinger v. A & M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979); California State Council v. Associated General, 648 F.2d 527 (9th Cir. 1980), cert. granted, ___ U.S. ___, 102 S.Ct. 998, 71 L.Ed.2d 292 (1982); and Ostrofe v. H.S. Crocker Co., Inc., 670 F.2d 1378 (9th Cir. 1982).

For the purposes of this matter, the Court will consider Parts 1 and 3 of the

test before it considers the second part of the standing analysis.

Sections 1 and 2 of the Sherman Act provide:

> § 1. Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states . . . is declared illegal.
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony. . . .

Plaintiffs maintain that the actions and omissions of Defendants establish the existence of a conspiracy to eliminate a potential competitor from entering the marketplace and that such actions and

omissions constitute an illegal monopoly on the fresh and processed potato market. Defendants maintain that there is no direct evidence of a conspiracy and that the sale of Rogers had the legitimate business objective of expanding production capacity in those markets.

The Plaintiffs' record in this matter contains statistical data on the relative present and potential market share of Ampco, Ampco's actions subsequent to the purchase of Rogers Foods in closing down processing facilities, and documentation indicating Alexander & Baldwin and Ampco were aware of the potential antitrust consequences prior to the acquisition of Rogers Foods. Thus, the Plaintiffs conclude that the purchase of Rogers Foods had the necessary and intended consequence of excluding Plaintiffs from entering the market as poten-

tial competitors. In Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975), cert. denied, 423 U.S. 1053, 96 S.Ct. 782, 46 L.Ed.2d 642 (1976), the Ninth Circuit Court of Appeals found that plaintiff had alleged sufficient factual information regarding the defendant's actions in purchasing existing commercial facilities desired by the plaintiff from which a jury could find anticompetitive intent, thus allowing plaintiff to survive defendant's motion for summary judgment on that issue.

Therefore, the Court finds that the state of the record in this matter contains sufficient evidence to establish that there is a genuine issue of material fact regarding an antitrust type violation and, thus, Plaintiffs withstand the Defendants' challenge to the first part

of the three-part standing test. It is conceivable to the Court that a jury could find an anticompetitive result or intent based upon Defendants' actions in selling and purchasing Rogers Foods.

The third part of the three-part test set forth by the Ninth Circuit requires that in order for the Plaintiffs to have standing, that Plaintiffs must show legal causation, i.e., that the injury caused was of the type that the antitrust laws were intended to prevent. California State Council v. Associated General, 648 F.2d 527, 537 (9th Cir. 1980), cert. granted, ___ U.S. ___, 102 S.Ct. 998, 71 L.Ed.2d 292 (1982). The Ninth Circuit has had recent occasion to construe the legal causation test in light of the decision of the United States Supreme Court in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477,

97 S.Ct. 690, 50 L.Ed.2d 701 (1977), in Ostrofe v. H.S. Crocker Co., Inc., 670 F.2d 1378 (9th Cir. 1982). In Ostrofe, the Ninth Circuit recognized that:

> The central theme of Brunswick [Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)] is that to be actionable under Section 4, plaintiff's injury should fall within the core of Congressional concern underlying the substantive provision of the antitrust laws allegedly violated.
> Id. at 1387.

The movement of the Ninth Circuit towards this type of zone-of-interests approach to the legal causation aspect of standing was first recognized by that Court in California State Council v. Associated General, 648 F.2d 527 (9th Cir. 1980), cert. granted, ___ U.S. ___, 102 S.Ct. 998, 71 L.Ed.2d 292 (1982), where the Court recognized that parties should still be permitted to litigate their claims if to do so would further the

policies underlying the antitrust laws. Likewise, in Ostrofe v. H.S. Crocker Co., Inc., at 1383 (9th Cir. March 8, 1982), the Court recognized that:

> The extent to which allowing a particular class of plaintiffs to bring suit for damages will further the enforcement purpose of Section 4 is an important factor in determining whether such plaintiffs should be allowed standing.

Applying this aspect of the test in conjunction with the finding of the Court relative to the first aspect of the test, the Court finds that, since the jury could find an anticompetitive result or intent from Defendants' actions that anticompetitive result or intent is the type of injury the antitrust laws were intended to prevent and Plaintiffs' injury could flow from that which makes the Defendants' acts unlawful. The Court further finds that allowing this class of plaintiffs to bring the suit for damages

would further the enforcement purpose of Section 4 of the Clayton Act and Sections 1 and 2 of the Sherman Act. Thus, the Court finds that the Plaintiffs withstand the Defendants' challenge to the third aspect of the standing test.

The second part of the three-part standing inquiry requires the Court to consider whether there is a genuine issue of material fact regarding whether Plaintiffs have sustained injury to their business or property. Because Plaintiffs were not engaged in an existing enterprise at the time of the alleged antitrust violations, Plaintiffs clearly cannot claim a business injury. Additionally, it has been settled since the early stages of this litigation that Plaintiffs are not suing in their former capacities as directors, officers, and/or employees of Rogers Foods. The Plain-

tiffs are suing as prospective purchasers of a business.

In Solinger v. A & M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979), the Ninth Circuit recognized that the appropriate inquiry in this case is whether Plaintiffs took substantial demonstrative steps to enter an industry and were thwarted by the Defendants' alleged antitrust violations. The Solinger opinion further suggests that in considering whether the Plaintiffs in this case are prospective purchasers, that the District Court should consider the approach adopted in Waldron v. British Petroleum Co., 231 F.Supp. 72 (S.D.N.Y. 1964).

The Waldron Court recognized:

> In determining whether a plaintiff has proved a requisite intention and preparedness, the courts have looked

for varying combinations of the following typical elements:

1. The background and experience of plaintiff in his prospective business;

2. Affirmative action on the part of plaintiff to engage in the proposed business;

3. The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business;

4. The consummation of contracts by plaintiff.

Id. at 81-82.

In determining whether the Plaintiffs have proved that they are prospective purchasers, the Court recognizes that the Plaintiffs satisfy the first two elements of consideration set forth in Waldron. However, the Waldron approach requires that the Court consider varying combinations of all four elements. Thus, the Court must determine to what extent, if any, the Plaintiffs satisfy the third

and fourth elements of Waldron in determining whether Plaintiffs have proved sufficient factual causation between Defendants' actions and Plaintiffs' injury, to give them standing in this matter.

The issues of whether the Plaintiffs had the ability to finance the business and the purchase of the facilities necessary to engage in the business, and whether the Plaintiffs consummated contracts in this matter, are closely related. The Defendants argue that the Plaintiffs failed to consummate a contract for the purchase of Rogers Foods with Defendant Alexander & Baldwin and that the Plaintiffs' inability to consummate the contract of purchase was directly related to the Plaintiffs' inability to obtain the required financing for the purchase. The Court has

reviewed the status of the record at the summary judgment stage and concludes that, as a matter of law, there is no genuine issue of material fact remaining that would allow the jury to find that a legal contract was executed by the Plaintiffs with Defendant Alexander & Baldwin for the purchase of Rogers Foods.

[3] Plaintiffs assert that a contract was formed at the January 9, 1979, meeting when Plaintiffs allegedly accepted Alexander & Baldwin's offer of December 29, 1978. However, for that oral contract to exist there must be an offer and acceptance as to all material provisions of the agreement, and that the acceptance of that offer, to be effectual, must be identical with the offer and unconditional and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms

of the offer is a rejection of the offer and is a counterproposition, which must in turn be accepted by the offeror in order to constitute a binding contract. Phelps v. Good, 15 Idaho 76, 96 P. 216 (1908); and C.H. Leavell & Co. v. Grafe & Associates, Inc., 90 Idaho 502, 414 P.2d 873 (1966).

[4] Plaintiffs contend that they accepted Defendant Alexander & Baldwin's offer of December 29, 1978, at the January 9, 1979, meeting. That offer can be construed in the light most favorable to Plaintiffs as being that Defendant Alexander & Baldwin offered to sell Rogers Foods to Plaintiffs for $13.5 million. However, at the January 9, 1979, meeting Plaintiff Bubar, chief negotiator for the Plaintiffs, asked for 120 days to consummate the deal. Bubar Deposition, p. 205 (May 27, 1981). Also at that

meeting, Plaintiffs attempted to obtain a letter of intent from Alexander & Baldwin that "the management group [Plaintiffs] would be the only one with whom Alexander & Baldwin would be negotiating for whatever time period was agreed upon in the letter of intent." Nowatzki Deposition, p. 381 (September 28, 1981). Thus, as a matter of law, the Plaintiffs' alleged acceptance was not an acceptance as to all material provisions of the offer. Due to the attempted introduction of new terms into the offer, the acceptance was conditional and modified the terms of the original offer, and thus was not identical with the offer. Therefore, Plaintiffs' alleged acceptance was a rejection of the original offer and constituted a counterproposition. The Court agrees with the characterization of this situation by Plaintiff Bubar in his

March 1979 declaration for the Department of Justice, in which he stated, "I and other members of management made an offer to purchase Rogers from Alexander & Baldwin, which had previously announced it was seeking offers."

Mr. Evans, chief negotiator for Alexander & Baldwin, also treated the introduction of these new terms regarding timing and exclusiveness, as a counter-proposition and informed the Plaintiffs that he "had to contract Mr. Cox in Honolulu with the proposal" before accepting or rejecting that counter-proposition. Smith Deposition, p. 113 (March 10, 1981). In the March 1979 declaration for the Department of Justice, Plaintiff Bubar stated, "Mr. Evans requested time to consider the offer. He refused the offer later that day stating as a reason that Alexander &

Baldwin did not believe Rogers' management could obtain financing." In his deposition Plaintiff Bubar admitted that when Mr. Evans contacted him later that day, Mr. Evans said, "No deal." Bubar Deposition, p. 450 (July 31, 1981). Therefore, Alexander & Baldwin rejected the Plaintiffs' counterproposition negating the possibility of the creation of a binding contract.

The factual record before the Court further details the finding that there was no binding contract entered into between Plaintiffs and Defendant Alexander & Baldwin. When Plaintiff Bubar was asked during a deposition, "Would you have been willing on that day [January 9, 1979] to sign a written contract which was not conditioned upon your being able to obtain financing?", Mr. Bubar responded, "I guess on that day

I could not have signed a contract without that condition." Bubar Deposition, p. 508 (July 31, 1981).

Mr. Edward Smith, a representative of First Capital Corporation of Chicago, also present at the January 9, 1979, meting, admitted that the Plaintiffs did not have financing available to accept Alexander & Baldwin's offer at that meeting. Smith Deposition, p. 141 (March 10, 1981). As of January 9, 1979, Plaintiffs had not executed any agreement with any financial institution to supply the capital necessary to purchase Rogers Foods. Those contractual and financial deficiencies are directly applicable to the third and fourth elements of the Waldron approach.

Thus, applying the factors set forth in Waldron and adopted by reference by the Ninth Circuit in the Solinger case,

the Court finds that there are no genuine issues of material fact remaining regarding whether or not Plaintiffs were prospective purchasers of Rogers Foods. Plaintiffs are unable to satisfy the requirements of Section 4 of the Clayton Act that they have been injured in their business or property by the Defendants. As a matter of law, the Plaintiffs are unable to prove factual causation between the alleged antitrust injury and the Defendants' actions in this case. The Plaintiffs were merely negotiating for the purchase of Rogers Foods with Alexander & Baldwin. Plaintiff Nowatzki correctly characterized the January 9, 1979, meeting as a "negotiating session." Nowatzki Deposition, p. 450 (September 29, 1981). Plaintiffs' expectations are insufficient to escalate to the legal status of a prospective purchaser under

Section 4 of the Clayton Act. Since Plaintiffs fail to properly satisfy the second part of the standing test, they are without standing in this matter to sue for damages under the antitrust laws.

Defendants also argue that the Plaintiffs' breach of contract claim is barred by the statute of frauds since Plaintiffs' alleged contract for the sale of securities fails to comply with the Idaho Code Section 28-8-319. Although the Court is disposed to agree with the Defendants' assertion, it is unnecessary to consider this aspect of the Defendants' Motion for summary judgment since the Court has found as a matter of law that no genuine issue of material fact remains by which a jury could find that a binding contract was entered into between the parties for the purchase of Rogers Foods.

Therefore, summary judgment is proper in this case because there are no genuine issues of material fact remaining regarding whether there was a binding contract between Plaintiffs and Defendant Alexander & Baldwin for the purchase of Rogers Foods. Since the Court has made that determination, it is unnecessary to pass upon the question of whether Plaintiffs' alleged contract claim is barred by the statute of frauds. Additionally, there are no genuine issues of material fact remaining regarding whether Plaintiffs have standing to sue under the antitrust laws of the United States. Since Plaintiffs do not have standing to sue under those laws, as a matter of law, the Court need not consider the Defendants' allegations that there is no evidence of an antitrust conspiracy.

NOW, THEREFORE, IT IS ORDERED, That Defendants' Motions for summary judgment be, and the same are hereby, GRANTED.

IT IS FURTHER ORDERED, That each party to this action assume their own costs of this litigation.

# APPENDIX C

## SHERMAN ACT

### Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1].

Section 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2].

CLAYTON ACT

Section 4 [in pertinent part]

(a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of

anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . . [15 U.S.C. § 15(a)

## APPENDIX D

(EXCERPT FROM DOC: 520241*

(CR 137, VOL. II)

AMPCO FOODS, INC.

ACQUISITION ORGANIZATION

REAL VALUE TO A.F.I.

- Capacity? (Cheap increase)
- Mgmt? (Make $ with same assets)
- Mkt stabilization? [Emphasis supplied.]

* Identified in pertinent part as handwritten notes of Robert P. Tiernan, officer of Ampco Foods, Inc. included as part of Exhibit 152 entitled "Son of Fun and Games"). A copy of the original document has been lodged with the Clerk of Court.

EXCERPT FROM DOC: 520242*

(CR 137, VOL. II)

AMPCO FOODS, INC.

ACQUISITION PROJECT

CONCEPTUAL GAME PLAN

PREMISE The value of the target company to Ampco Foods, Inc. can be divided into two parts:

(A)

(B)

(C) Eliminate a mkt "disrupter" and an over-capacity prod. [Emphasis supplied.]

* Identified in pertinent part as handwritten notes of Robert P. Tiernan, officer of Ampco Foods, Inc. included as part of Exhibit 152 entitled "Son of Fun and Games"). A copy of the original document has been lodged with the Clerk of Court.

EXCERPT FROM DOC: 520207*

(CR 137, VOL. II)

NEGOTIATIONS

Jan. 9, 1979

Antitrust considerations discussed.

[Emphasis supplied.]

* Identified in pertinent part as handwritten notes of Robert P. Tiernan, officer of Ampco Foods, Inc. included as part of Exhibit 152 entitled "Son of Fun and Games"). A copy of the original document has been lodged with the Clerk of the Court.

EXCERPT FROM DOC: 520180*

(CR 137, VOL. II)

RON McKINSTRY

2-7-71

Substance

DOJ

1. Investigation
2. TRO (2 wks)
3. Prelim. Inj. (6 mos)
   - Probable success - merits
   - Irreparable harm
4. Perm. Inj.

4A. Divestiture

Injured Party (GROWER, CUSTOMER, RFI)

1. Injunction/T.R.O.

EXCERPT FROM DOC: 520180

(CR 137, VOL. II) (cont.)

2. No divestiture (split) in 9th CA

3. Damage suit (treble damages) Poss.

* Identified in pertinent part as handwritten notes of Robert P. Tiernan, officer of Ampco Foods, Inc. included as part of Exhibit 152 entitled "Son of Fun and Games"). A copy of the original document has been lodged with the Clerk of Court.

CR 150, VOL. III

(EXHIBIT 3 TO DEPOSITION OF

JOSEPH J. GILLINGS, TAKEN

MARCH 9, 1981)

THE FIRST NATIONAL BANK OF CHICAGO

January 3, 1979

Mr. Donald J. Nowatzki

Vice President-Finance

Rogers Foods, Inc.

P.O. Box 2188

Idaho Falls, Idaho 83401

Dear Don:

As a present lender to Rogers Foods, we are familiar with the company's operations and with the capabilities of

management. As you know, we have reviewed certain financial statements from projections relating to your proposed purchase of Rogers from Alexander & Baldwin. While there are still details in the plan which need to be finalized, based upon the information furnished to us and our developed knowledge of the company, we continue to be very interested in pursuing the opportunity to provide the commercial bank debt financing for such a management buyout.

Sincerely,

/s/ Joseph J. Gillings
Vice President

CR 150, VOL. III

(EXHIBIT 32 TO DEPOSITION

OF DONALD J. NOWATZKI,

TAKEN MAY 29, 1981)

IDAHO FIRST

January 4, 1979

Mr. Donald J. Nowatzki

Vice President-Finance

Rogers Foods Inc.

P.O. Box 2188

Idaho Falls, Idaho 83401

Dear Don:

During our recent discussions, including those with Ron Bubar, I made mention that in the event the ownership

of Rogers Foods should change, our bank would still be greatly interested in being the primary depositing bank and also participate in the lending area.

I am directing this letter to you for the purpose of putting my remarks in writing so that your company will be aware of our intentions.

Sincerely,

/s/ Donald J. MacKay
Vice President and Manager

THE IDAHO FIRST NATIONAL BANK - P. O. BOX 69 - IDAHO FALLS, IDAHO 83401

CR 150, VOL. III

(EXHIBIT 33 TO DEPOSITION OF

DONALD R. NOWATZKI

TAKEN MAY 29, 1981)

SEATTLE-FIRST NATIONAL BANK

December 29, 1978

Donald J. Nowatzki

Vice President of Finance

Roger's Foods, Inc.

3100 Rollandet

P. O. Box 2188

Idaho Falls, Idaho 83401

Dear Don:

I would first like to take this opportunity to thank you and Ron for

meeting with us earlier this month. Visiting two of the plant locations was not only interesting for me personally but provides a better understanding of the company's operations.

I think our discussions were very productive regarding managements' proposal to purchase the Roger's division from Alexander & Baldwin. While there still remains some details to be resolved, I think it is safe to say that we are definitely interested in assisting in such a venture. The structure and nature of the accommodations we discussed could become the basis for a very "bankable" package and we want to express our sincere interest in participating as your negotiations progress.

Please feel free to contact either Pat or myself if we can assist in any fashion or if only to act as a sounding board. Please extend our Holiday wishes to all the Roger's group.

Very truly yours,

/s/ Robert J. Lane
Vice President

EXCERPTS FROM CR 150, VOL. III

(PARTIAL DEPOSITION TRANSCRIPT
OF DONALD JACK NOWATZKI,
VICE PRESIDENT OF ROGERS FOODS, INC.
MAY 28, 1981, at pp. 73,
100, 101, 105, 106, 116, 117).

A. We had a number of people visit us in Idaho Falls. Somewhere in the latter part of November Tony Stevens visited Idaho Falls. The banking people from the Northern Trust, First National Bank of Chicago, Seattle-First and Skip Smith from First Cap Corp. visited Idaho Falls.

Q. That was in about what time period?

NOWATZKI PARTIAL DEPOSITION TRANSCRIPT

(cont.)

A. Approximately the early part of December.

* * *

The First National Bank of Chicago, the gentleman I talked to there was Steven Baker, had no concerns about being able to finance on a working capital loan within the presentation that was shown on the long-term debt page.

In conversations with Seattle-First National Bank -- and, again, I don't recall which one of the conversations -- the point came forward in -- Pat Dineen made the comment that their bank had tripped and had fallen the first time Rogers Foods had put their revolving loan agreement in place, the 8 and a half million dollar loan. And that Pat was very confident that their bank would be

aggressive in assuring that they had a piece of the action or all of the action, perhaps, on the proposed management buy-out.

* * *

Idaho First was -- their role has been as a loan participant, the local bank representative, and Don MacKay during that entire time period was very positive relative to the financing of Rogers Foods, Inc.

* * *

Number two, working with the financial community, you cannot get them to give a commitment without some intent

-- letter of intent between the two parties involved in the transaction. We were unable to get that letter from Alexander & Baldwin during this time period because of the "hold " situation, so it was impossible to get the bank to give a -- or to get the venture capitalists to give a full commitment of funds.

Q. Did you try to do so in that time period?

A. No.

Q. It was simply your assumption that they would not give a firm commitment without a letter of intent?

A. No. They told us that we need a letter of intent to be able to put together a package.

But, in all of the conversations they verbally assured that we will be a participant in the transaction if and when a letter of intent is signed.

* * *

Q. (By Mr. Steer) What did you do after the conclusion of the meeting on January 9?

A. We left the meeting room and went back to the hotel.

Q. What did you personally do after that?

A. Ron Bubar and Skip Smith took a period of time on the order or a half hour to at the most an hour. Following that time, we started laying plans for specific visits and contacts with various

financial people that would be involved in the management buy-out. We scheduled, I thi , specifically the next two weeks of time.

EXCERPTS FROM CR 150, VOL. III

(PARTIAL DEPOSITION TRANSCRIPT
OF EDWARD F. SMITH
[Senior Investment Manager of
First Capital Corporation of
Chicago], March 10, 1981,
at pp. 91, 152, 158, 198, 200)

Q. Before getting committed would you have had to know the agreed upon price of Rogers Foods, the purchase price?

A. Yes. We would have had to have some agreement about the price.

* * *

We felt that the transaction stood well, however, based upon bank financing.

* * *

Q. Was thirteen and a half a bargain purchase as you have used that term?

A. Thirteen and a half million dollars I believe, was still a bargain purchase. I would have to go back and check the records and facts.

* * *

Q. Realizing, Mr. Smith, that you have testified to this point that as of January 9th, 1979, your company had made no commitment with regard to the division

of the equity financing. Had you at that time formed an opinion as to whether or not you would be able to put together the equity financing for this transaction?

* * *

MR. GREENAN: As of January 9th, 1979. The question is whether or not as of that date you had formed such an opinion?

THE WITNESS: No. I think that we felt that it would be more difficult to put together the senior financing for this transaction than the equity. I think that we were confident that we could put the equity together if everything fit together.

SMITH PARTIAL DEPOSITION TRANSCRIPT

(cont.)

BY MR. GREENAN:

Q. What was your opinion as to the senior financing?

A. That we could get enough of it and on the right terms.

EXCERPTS FROM CR 150, VOL. III

(PARTIAL DEPOSITION TRANSCRIPT
OF HERBERT ANTHONY RIDSDALE STEVENS
[Senior Investment Manager of Security
Pacific Venture Capital Corporation],
March 9, 1981, at pp. 36, 87, 92, 97,
101, 102, 103, 114, 118, 120.)

Q. Was the subject of raising long-term debt from banks discussed that day?

A. I don't know whether it was discussed in detail, but it was assumed all along in this deal that it would be easy to raise money from the banks and it was quite clear to me that it was probably going to be easy enough compared with most deals to raise moneys from the

banks because of the excellent facilities of Rogers Foods.

* * *

Q. BY MR. KANE: What do you mean by a double deal?

A. I mean a deal which -- whereby the management, the particular management, could buy the assets which we were told were being sold or the company which we were told was being sold on the basis of a leveraged buyout such that the rate -- such that the projected rate of return for the equity investors would be adequate.

Q. Did you include Security Pacific --

A. Yes.

Q. -- as one of the equity investors?

A. Yes.

Q. So you were satisfied at this point, Mr. Stevens, that this was a mature company --

A. Yes.

Q. -- with mature management?

A. Yes.

* * *

THE WITNESS: I would like to answer the question by saying that I do not recall what I thought of this apparent operating plan at the time but that at all times while I was involved with the potential purchase of Rogers Foods by the

management I felt that the proposed deal was a doable deal and I knew that there were some likely problems with it. But this applies to all deals, and I knew that we would be investigating the company in very much greater detail or in greater detail subsequently.

* * *

Q. I would like to direct your attention to the third paragraph on the next page, Page 4, starting with the word "Smith."

Can you read that paragraph into the record, please?

A. (Reading:)

"Smith gave me three set sof figures done for him by the

company on 29 December. He argues that even conservative assumptions result in a doable deal."

* * *

A. No. I didn't say that. I said that if First Chicago -- if First Chicago Venture Group and Security Pacific Venture Capital were involved in this deal, regardless of whom else might be putting up equity funds, that the ratio between the funds supplied by First Chicago and the funds supplied by Security Pacific Venture Group, in both cases the venture groups would be in the proportion of 57 to 43.

Q. Was this acceptable, as far as you were concerned, at this particular meeting?

* * *

THE WITNESS: Yes. According to my notes, it says again, "I then phoned Skip to tell him okay. He may have 57/43 money," meaning what I have just described. He had presumably suggested that this is what they would like, and I was agreeing to it.

* * *

Q. Can you tell me what your reference to a doable deal signifies on Page 4 of this exhibit?

STEVENS PARTIAL DEPOSITION TRANSCRIPT

(cont.)

A. I think it signifies that Mr. Smith thought that even the conservative assumptions projected by management would result in a doable deal in that if, according to those projections, a certain amount of -- the amount of debt financing in those projections at the rates which are projected and the amounts of venture equity money, et cetera, at the rates projected would result in this being a doable deal, a deal which would work. There are many of these deals which don't work even on projections.

* * *

A. Yes, and I have previously testified that I understood that -- that I felt that this company could raise

adequate debt finance on its assets because there were lots of assets.

Q. When you say "encouraging," you have that testimony in mind; am I correct in that, sir?

* * *

THE WITNESS: Well, when I said earlier "encouraging," I knew that the management had contacted some banks because they had told me they had contacted some banks and I got the impression from them that they had had an encouraging response and I also myself had made my own assumption that -- from looking at the balance sheets and visiting the premises that the debt financing could probably be raised.

STEVENS PARTIAL DEPOSITION TRANSCRIPT

(cont.)

* * *

Q. What is the reference to, "$280,000 redeemable"?

A. That refers to the management putting up $280,000 of redeemable preferred stock, junior redeemable preferred stock, it would have been.

Q. In other words, management would together invest $280,000 plus $20,000?

A. Yes, except it had always been the case that management was talking about investing $300,000 in the aggregate.

Q. Did you have any impression at this time or prior to this time, January 9, 1979, of management's ability to put up $300,000 in the aggregate?

STEVENS PARTIAL DEPOSITION TRANSCRIPT

(cont.)

A. I assume that they could put up $300,000.

* * *

Q. With those projections, Mr. Stevens, were you prepared as of this date, January 9th, 1979, to make a preliminary investment memorandum for Security Pacific's investment committee?

* * *

A. Well, at that point in time I was assuming that because these people had got on very well with each other that there would be an agreement in principal that these people could buy this company and that some projections would be produced and that I would look at them and that Smith and I would discuss other

details of the deal and probably I would discuss other details of the deal with Mr. Emmeluth and the management and so on, and as I said earlier, that the thing would move ahead.

EXCERPTS FROM CR 150, VOL. III

(PARTIAL DEPOSITION TRANSCRIPT
OF RONALD OLIVER BUBAR
[President of Rogers Foods, Inc.],
May 26, 1981, at p. 128.)

Q. Did you have financing committed to pay that $10 million at the time you made the telephone call?

A. It is very difficult to get financial commitments until you know what an agreed-upon price is; so I would have to say no, we did not have financial commitments, we had financial people interested.

* * *

CR 150, VOL. III

(EXCERPTS FROM EXHIBIT 39 TO THE DEPOSITION OF DONALD J. NOWATZKI, TAKEN JUNE 1, 1981)

MANAGEMENT INVESTOR GROUP MEETING

December 2, 1978

Participants: Ron Bubar, Bill Barth, Chaz Houpt, John Netterberg, Don Nowatzki, Jim Palo

ESOP

1. We agreed that Ron should make a contact with a reference in San

Francisco to determine the propriety of ESOP.

BOARD OF DIRECTORS

1. We agreed that the Board composition would include outsiders and management representation on the Board. Management's maximum participation would be, for example, a maximum of three out of five Board members or four out of seven Board Members. Board responsibilities would be limited to normal Board functions, for example, Capital and Operating Plan approval, top management salary and succession plans and dividend declarations. The Board does not become involved

in operating decisions which responsibilities belong to the President.

MANAGEMENT CASH INVESTMENT

1. The minimum investment will be $50,000 per participant. Each individual's sources of funds are limited to their personal resources and/or funds from commercial financial institutions or from relatives. If other sources of funds are obtained, this must be disclosed and the balance of the group has a right to limit the use of such funds. (Emphasis supplied.)

2. The initial investment will be split equally among the six participants as long as the average dollars required per individual is within their personal capacity to finance.

An unequal investment level may be required by other equity investors which would override this agreement.

3. Each of the six managers have the choice to participate in the equity investment up to the lowest financial capacity of any one member of the group. If the amount of equity funds required from management exceeds the amount available via equal participation by each, the "excess" investment will

be split equally among the remaining management participants.

4. This "excess" investment will be some type of non-voting equity instrument, but will have the same value as regular common stock in the event of a subsequent sale of common stock or a sale of the assets of the company.

MANAGEMENT SWEAT EQUITY

1. Some percent of the sweat equity will go into a stock pool which is distributed by the Board of Directors, to any employee based on performance.

2. The balance of the sweat equity is shared equally by the original management investors.

3. We discussed but did not conclude how sweat equity would accrue to an individual - i.e. proportionately over a predetermined time or on some formula basis with a kicker toward the end of a selected time period.

4. Our base negotiating stand will be to obtain a maximum stock equity potential "on the come" even if this requires taking a disproportionately low equity percent based on cash investment, as long as some

CR 150, VOL. III

(EXCERPTS FROM EXHIBIT 39 TO THE DEPOSITION OF DONALD J. NOWATZKI, TAKEN JUNE 1, 1981)

protection relative to equity ownership percent exists in the event the investor sells us out early.

* * *

PLAINTIFFS' ANSWERS TO INTERROGATORIES 4, 5 AND 6 OF AMPCO FOODS' THIRD INTERROGATORIES TO PLAINTIFFS, DATED JANUARY 27, 1982

4. The pricing of dehydrated potato products was drastically different in the post as compared to the pre-acquisition time periods of AMPCO and Rogers Foods. In the pre-acquisition time period when AMPCO and Rogers Foods were competitors, the prices for those dehydrated products which both firms had the capacity to manufacture (i.e., granules, etc.) remained steady despite increasing prices for major inputs such as labor, energy, and raw potatoes. In the post acquisition time period, the

published price lists of AMPCO for the same products showed increases which were two and three fold that which existed in the pre-acquisition time period. Without cost justification dehydrated potato products which AMPCO had the capacity to produce increased much more sharply than dehydrated potato products which AMPCO marketed but did not produce. The acquisition of Rogers Foods by AMPCO increased the market power of AMPCO and had a material effect on the unit of wholesale product price increases in the post acquisition era.

5. The acquisition resulted in fewer firms purchasing potatoes for dehydration purposes and less competition in that area. As a result, in the post acquisition time period the farm price or

value of potatoes used to manufacture dehydrated potato products dropped relative to fresh potato products despite the fact that wholesale prices for dehydrated potato products increased two and three fold.

6. The estimated actual damages incurred by plaintiffs is equal to the estimated foregone income stream of Rogers Foods and the resulting increase in the value of management's share of total equity in the company.

EXCERPTS FROM CR 137, VOL. II

PARTIAL DEPOSITION TRANSCRIPT
OF MILTON F. EBERHARD
[President of Ampco Foods, Inc.],
taken November 2, 1981
at pp. 116-120.)

Q. Does Ampco carry on any operations at the Grand Forks, North Dakota plant which were acquired from Rogers?

A. No.

Q. Does Ampco at this time carry on any operations at the Moses Lake plant which was acquired from Rogers?

A. We are not processing any potatoes there to my knowledge, but we

are using the warehousing and some of the potato storages at that plant.

Q. For a period of time after acquisition of those assets, did your company process potatoes at the Rogers Moses Lake plant?

A. Yes.

Q. For what period of time?

A. The balance of the operating season, in the spring of 1979, after the acquisition.

Q. And after that period of time has your company operated the Rogers Moses Lake plant as a potato processing facility?

A. No.

Q. What use is now being made of the Idaho Falls processing plant which

was acquired by Rogers, or by Ampco from Rogers?

A. To the best of my knowledge, it is being used as a piece-sorting plant, in other words, piece-sorting plant, after pieces are processed, remove the defective pieces. There may be some packaging and I know there is warehousing there.

Q. Is there any actual processing of potato product done now at Idaho Falls?

A. No. A substantial amount of the capacity for manufacture of pieces in Idaho Falls has been transferred to Rexburg.

Q. By that time you mean the equipment itself that was used?

A. We have upgraded the capacity of the Rexburg plant and moved parts of some of the dryers to Rexburg.

Q. What use is now being made of the Rogers Rexburg processing plant which was acquired by American Potato Company, or Ampco, rather?

A. It is making piece products, slices, dices, juliennes and granules.

Q. Are any hashbrowns being processing at Rexburg at this time?

A No, not that I'm aware of.

Q. Does your company process potato flakes at this time?

A. No.

Q. Does your company process potato flour at this time?

A. No.

EBERHARD PARTIAL DEPOSITION TRANSCRIPT

(cont.)

Q. Following the acquisition of these assets by your company, Mr. Eberhard, did your company for some period of time process potato flakes at the Idaho Falls plant?

A. Yes.

Q. For what period of time?

A. For a year.

Q. Do you recall when you ceased?

A. A little over a year. We processed the balance of the season, in the spring of '79, and then the following season.

Q. For a period of time after you acquired the Idaho Falls plant, did your company process potato flour at that plant?

A. Yes.

EBERHARD PARTIAL DEPOSITION TRANSCRIPT

(cont.)

Q. For what period of time?

A. Same period of time, I believe, that we processed potato flakes.

Q. When did you cease processing potato products at the Idaho Falls plant?

A. Sometime in, to the best of my knowledge, in the summer of 1980.

* * *

NO. 84-1687 (2)

Office-Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

# IN THE
# Supreme Court of the United States

October Term, 1984

RONALD O. BUBAR, et al.,
Petitioners,
v.
AMPCO FOODS, INC., et al.,
Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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39pp

## QUESTION PRESENTED

Did the Court of Appeals correctly follow and apply this Court's decision in Associated General Contractors v. California State Council of Carpenters in holding that petitioners lacked antitrust standing?

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1984

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RONALD 0. BUBAR, et al.,
Petitioners,
v.
AMPCO FOODS, INC., et al.,
Respondents.

---

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Respondent, AMPCO FOODS INC.,[1] respectfully requests that the Petition for a Writ of Certiorari be denied.

## STATEMENT OF THE CASE

### A. Description of Proceedings Below

In 1978 and 1979, the Bubar petitioners made an unsuccessful attempt to arrange for financing and for additional equity investors to assist them in their efforts to obtain a small minority interest in the stock of respondent Rogers Foods, Inc. ("Rogers"). Because

---

[1]Pursuant to Supreme Court Rule 28.1, Respondent AMPCO FOODS INC. discloses that in 1982, it changed its name to BASIC AMERICAN FOODS. BASIC AMERICAN FOODS is a privately held corporation, along with its wholly-owned operating subsidiaries, Basic Vegetable Products, Inc. and Sunspiced, Inc.

the Bubar petitioners were unsuccessful in their attempts to obtain financing and co-investors, and because respondent, Alexander & Baldwin, Inc. ("A&B") had been unable to locate other interested buyers, A&B sold certain of the assets of Rogers to respondent AMPCO FOODS INC. ("AMPCO").

In January, 1980, petitioners commenced an action in the United States District Court for the District of Idaho alleging that the asset acquisition agreement between A&B and AMPCO violated the federal antitrust laws. The complaint also asserted a common law claim against A&B for breach of an alleged contract to sell Rogers to petitioners. Following extensive document production by all parties and upon completion of the depositions of all party witnesses involved in pertinent discussions and negotiations, respondents A&B, Rogers and AMPCO filed motions for summary judgment on the breach of contract and antitrust claims. Following a hearing and review of the record, the district court held that petitioners lacked standing to raise any alleged violations of the antitrust laws. The district court also held that respondent A&B was entitled to summary judgment on the breach of contract claim. The Ninth Circuit affirmed the holdings of the district court from which the Bubar petitioners appealed.[2]

### B. Summary of Background

In the summer of 1978, respondent A&B decided to sell certain of its subsidiaries and assets, including respondent Rogers. The Bubar petitioners, who comprised a part of the management group of Rogers, became aware of this decision in July, 1978, and began to investigate whether it would be possible for them to secure financing and identify other interested equity investors to enable them to purchase Rogers or some interest therein. Pet. App. A, 4a.

---

[2]In the Ninth Circuit, the Bubar petitioners abandoned their claim that A&B had breached a contract to sell Rogers to petitioners.

In July, 1978, A&B also held discussions with Dalgety, a food company, concerning the possible sale of Rogers. In October of that year, Dalgety terminated those discussions. AMPCO App. A2. Subsequently, A&B held discussions concerning the possible sale of Rogers with a number of other companies. Pet. App. A, 6a; AMPCO App. B1-B4. A&B was unable to reach an agreement with any of these companies.

In late December, A&B stated that it would be willing to sell Rogers to the Bubar petitioners for a firm price of $13.5 million. AMPCO App. C3. A&B and the Bubar petitioners agreed to meet during the week of January 8, 1979. A&B informed Bubar that it would be meeting with other possible purchasers during that week. Pet. App. A, 6a.

Throughout the summer, fall and winter of 1978, the Bubar petitioners attempted to obtain financing and other equity investors. Id. at 7a. Petitioners never secured a written agreement of financing with any bank or other financial institution. Petitioners had not identified all of the potential equity investors and had not signed any agreement with any potential equity investor. Id. at 9a. For these reasons, the corporation which would have purchased Rogers and signed any purchase agreement had not been formed. Id. at 10a, 24a, 28a-29a. No determination had been made concerning the extent of the Bubar petitioners' interest in this unformed company; it only had been determined that the Bubar petitioners would receive a small minority interest, perhaps as small as 10%. No decisions had been reached concerning the manner in which this unformed corporation would operate or in what form the lenders and other equity investors would participate. Id. at 10a-12a.

A&B and the Bubar petitioners met on January 9, 1979 to discuss the possible sale of Rogers. Petitioners were unable to make a firm offer for Rogers. No agreement of any kind was signed at that meeting. Id. at 11a-12a.

Later that day, A&B met with representatives of respondent AMPCO. After several days of negotiations, AMPCO and A&B signed a letter of intent, pursuant to which AMPCO agreed to purchase assets of Rogers' potato division for $11.35 million. Id. at 13a. A&B suggested that the Bubar petitioners might wish to consider purchasing the onion and garlic division of Rogers. AMPCO App. C3-C4. Because petitioners failed to make a timely response, these assets were sold to another company.

On January 29, 1979, the Department of Justice advised AMPCO, Rogers and A&B that it wished to review the proposed transaction between AMPCO and A&B. A&B instructed the Bubar petitioners to provide the Department of Justice with whatever information it required and to otherwise cooperate fully. Petitioners traveled to San Francisco to meet with Justice Department attorneys and supplied sworn statements to the Department. During the course of the next two months, Rogers, AMPCO and the Bubar petitioners gathered and produced voluminous information to the Department. Upon completion of its thorough investigation, on March 13, 1979 the Department announced that it would not seek to challenge the sale to AMPCO, which closed on March 15. Pet. App. A, 13a-14a; AMPCO App. A3; B5; C1-C2, C4.

## REASONS FOR DENYING THE WRIT

### I. The Ninth Circuit Properly Followed and Applied this Court's Decision in Associated General Contractors

Petitioners recognize, as they must, that this case is controlled by this Court's recent decision in Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) (hereinafter "Associated General Contractors"). Petitioners do not argue that the Ninth Circuit erred in following Associated General Contractors or in identifying the factors which lower courts must examine in determining

whether a party has standing to bring a treble damage action under Section 4 of the Clayton Act. Petitioners contend only that the district court and the Ninth Circuit improperly evaluated the evidence associated with these four factors.

In Associated General Contractors, two affiliated unions asserted antitrust claims against a group of construction general contractors, alleging that the defendants had restrained competition in the market for construction contracting by coercing landowners and others to enter into construction contracts with non-union contractors. This allegedly reduced the business of union contractors which, in turn, diminished the business activities of the union plaintiffs. This Court held that the unions lacked antitrust standing and were not proper parties to bring treble damage claims.

In Associated General Contractors, this Court identified four factors which must be analyzed in determining whether a party has standing under Section 4 of the Clayton Act:

- First, "it is appropriate to focus on the nature of the plaintiff's alleged injury" and whether it is "the type that the antitrust statute was intended to forestall." 459 U.S. at 538.

- Second, the district court must assess the indirectness of the asserted injury and determine whether there are other parties who would have been more directly injured, if indeed an antitrust violation had occurred. Id. at 540-42.

- The district court must next examine the nature of the damage claims asserted and determine whether the injury alleged is speculative. Id. at 542-43.

- Finally, this Court instructed that the lower courts must analyze whether the claims

> asserted create either a risk of duplicative recovery or a danger of complex apportionment of damages. 459 U.S. at 543-45.

This Court in Associated General Contractors concluded that, taken as a whole, the evidence relating to each of these factors "weigh[ed] heavily against judicial enforcement of the Union's antitrust claim." Id. at 545.

Respondent AMPCO respectfully submits that the Court of Appeals made a thorough analysis of all relevant facts and properly evaluated these facts in view of each of the concerns expressed in Associated General Contractors. The Ninth Circuit correctly concluded that the undisputed facts, taken as a whole, warranted the district court's holding that the petitioners lacked standing. Because the Ninth Circuit correctly followed and applied this Court's most recent ruling on antitrust standing, and because there are no important legal or public issues at stake in this litigation, review by this Court is unnecessary.

### A. The Court of Appeals Correctly Found that the Petitioners' Alleged Injury Was Uncertain and Speculative

Petitioners concede that they wished to acquire a minority interest in a corporation which they hoped to form to purchase the stock of respondent Rogers. Petitioners claim that they were wrongfully denied this opportunity as a result of respondent A&B's decision to sell certain assets to respondent AMPCO. Both the district court and the Ninth Circuit properly determined that petitioners lacked standing because they were unable to demonstrate "preparedness" to enter the business. Pet. App. B., 22b-31b; Pet. App. A., 34a-37a.

The record demonstrates that petitioners met with representatives of A&B on January 9, 1979, to discuss the possible sale of Rogers. It is undisputed that as of that date, petitioners had not secured any written agreement of financing with any bank or other financial institution. Pet. App. A, 9a. Despite months of efforts,

petitioners lacked the funds, financing and co-investors to complete the acquisition. For this reason, it was uncertain whether petitioners would ever be financially able to acquire any interest in respondent Rogers.

The Ninth Circuit also concluded that petitioners' alleged injury, if any, was speculative and inestimable. Petitioners do not contest the fact that they were not to be the only shareholders in this new company which would acquire an interest in Rogers. In fact, the record is undisputed that even if an acquisition on behalf of petitioners were feasible, the petitioners would receive only a small minority interest, perhaps as small as 10%. Pet. App. A, 10a-12a. Petitioners had not even identified who the other equity investors would be. Id. at 9a. On the basis of this record, the Court of Appeals properly determined that:

> [T]he speculative nature of the harm is increased because of the uncertainty that [the unformed corporation which was to acquire the Rogers stock] would ever have been financially able to become a competitor. The speculative nature of the harm is further increased because the plaintiffs were only prospective minority shareholders in the corporation that was to be the competitor, and the distribution of the stock and the relative stock rights [were] uncertain.

Id. at 39a.[3] For these reasons, the Court of Appeals

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[3]Respondent AMPCO has consistently argued that petitioners have neither alleged nor suffered any "antitrust injury," the first of the factors set forth in Associated General Contractors. This Court held in Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) that:

> . . . plaintiffs must prove "antitrust" injury, which is to say injury of the type that the antitrust laws were intended to prevent and that flows from that

(continued)

properly determined that petitioners' alleged injury was so uncertain and speculative that petitioners were not "proper [parties] to bring a private antitrust action." See Associated General Contractors, 459 U.S. at 535, n.31.

### B. The Court of Appeals Correctly Found That the Petitioners' Alleged Injury Was Indirect and Remote.

Petitioners' alleged injury is indirect and remote because they were not financially prepared to acquire the Rogers stock. Pet. App. A, 9a. Even if petitioners had been prepared and actually formed the corporation they hoped would become a competitor in the market, any injury suffered by the petitioners would truly have been only an indirect result of the injury suffered by the corporation. Because petitioners had hoped to acquire an unspecified minority interest, the alleged injury is even more indirect. For these reasons, the Ninth Circuit properly concluded that petitioners' alleged injury was remote.

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> which makes defendants' acts unlawful. The injury should . . . be "the type of loss at the claimed violation. . . would be likely to cause."

429 U.S. at 498-499.

Petitioners were not injured as the result of lessening of competition in the fresh or processed potato industries as alleged in their complaint. AMPCO App. D3-D4. Petitioners, if indeed they have been injured at all, would have suffered the same injury if any other company or group of former employees had purchased Rogers; they would have been foreclosed from the opportunity to purchase an interest in Rogers and to operate it profitably. As a matter of law, petitioners' claimed injury is not "the type [of injury] the antitrust laws were intended to prevent." See Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir. 1984).

In both Blue Shield of Virginia, Inc. v. McCready, 457 U.S. 465 (1982), and Associated General Contractors, this Court emphasized that standing may be denied to the plaintiff before the Court where there were other identifiable parties with more direct injuries than the potential plaintiff. In Associated General Contractors, this Court denied standing to the unions, in part because construction contractors and subcontractors were more directly injured and were therefore more appropriate antitrust plaintiffs. This Court reasoned that:

> The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Associated General Contractors, 459 U.S. at 542.

The Court of Appeals in this case applied the factors discussed in Associated General Contractors to the undisputed facts and found that the petitioners were not proper parties to challenge any alleged lessening of competition in the business of potato processing. The Ninth Circuit correctly noted that the federal government could have challenged the transaction and that other parties could have brought injunctive actions under Section 16 of the Clayton Act. Pet. App. A, 19a. See Monfort of Colorado, Inc. v. Cargill, Nos. 83-1305, 83-2588 (10th Cir. April 23, 1985). The Justice Department in fact investigated the sale to AMPCO and decided not to challenge the acquisition.

Moreover, there were several types of persons who would have been more directly affected had the acquisition in fact been anticompetitive, including

potato growers, purchasers of processed potato products, or existing competitors.[4] If the sale of certain Rogers' assets to AMPCO in fact restrained trade, these three classes of victims would have been directly injured by any resulting lessening of competition. Their failure to assert such claims sheds "doubt on the proposition that these 'victims' were actually harmed at all." Associated General Contractors, 459 U.S. at 542, n.47. For these reasons, there is no likelihood that an antitrust violation would go undetected or unremedied if the petition is denied.[5]

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[4]In fact, potato growers in the Ninth Circuit have previously brought antitrust claims on other occasions when they believed certain potato processors had violated the antitrust laws. E.g., Treasure Valley Potato Bargaining Ass'n. v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974). Moreover, had the acquisition in fact constituted an unreasonable restraint of trade, the damages suffered by these other potential plaintiffs would have been less speculative than the value of the petitioners' minority interest in the unformed corporation. Buyers of processed potato products would be able to demonstrate readily quantifiable injuries due to higher prices; potato growers, conversely, could establish damages from the lower prices they would argue they received for raw potatoes. An action by a member of either of these groups or by an existing competitor "would encounter none of the conceptual difficulties that encumber" petitioners' claims. Associated General Contractors, 459 U.S. at 541-42.

[5]Petitioners argue, without citing any evidence, that they were the intended victims of the alleged anticompetitive acts. This Court has consistently held that anticompetitive intent by a defendant, standing alone, is not sufficient to confer standing upon a remote plaintiff. Associated General Contractors, 459 U.S. at 537; Blue Shield of Virginia, Inc. v. McCready, 457 U.S. 465, 479 (1982). In view of the undisputed evidence demonstrating the indirect and remote nature of (continued)

### C. The Court of Appeals Properly Held that the Complexity Involved in Apportioning Petitioners' Claimed Damages Was a Factor Which Weighed Against Granting Petitioners Standing in This Action.

In Associated General Contractors, this Court determined that:

> the District Court would face problems in identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities.

459 U.S. at 545. This factor militated against allowing the unions standing to challenge the alleged unlawful conduct specified in their complaint. In this case, the Court of Appeals found that if the district court had permitted the case to proceed to trial, it would have faced enormous difficulties in apportioning damages. For that reason, the Ninth Circuit held that this factor also weighed against permitting petitioners' standing to pursue their antitrust claims. Pet. App. A, 39a-41a.

Petitioners concede that they had hoped to acquire an unspecified minority share in a company they hoped to form. Petitioners had yet to identify who all of the co-investors in that venture might be. It was wholly uncertain what interest petitioners would own in the

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petitioners' claimed injury, the Court of Appeals properly determined that petitioners' naked assertion that they were somehow the "intended" victims of the transaction was insufficient to confer standing.

proposed company.[6] The Ninth Circuit properly determined that apportioning damages between the petitioners and other possible claimants would be impossibly complex. Pet. App. A, 39a. Had this case gone to trial and the petitioners prevailed, other co-investors (as well as growers, suppliers and/or actual competitors) might have filed similar and duplicative claims within the statutory period.[7]

Petitioners themselves raise another serious problem making apportionment of the alleged damages excessively complex: whether and how much extra stock or "sweat equity" they might have gained through their performance. The possibility that petitioners may have gained such additional stock creates further complexities:

- what percentage stock interest petitioners' co-investors would have agreed could be earned as "sweat equity;"

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[6]Because there had been no final decision concerning the identity of all co-investors in petitioners' proposed acquisition group, even the so-called minimum ten percent ownership position which petitioners claim they would have received is wholly uncertain.

[7]Petitioners respond, with the benefit of hindsight, that there is now no danger of overlapping recoveries because the venture capital firms have not sued and are prohibited from doing so now by the statute of limitations. As both the Seventh and Ninth Circuits have held, such an "after the fact" determination has no place in a court's analysis whether a potential plaintiff has standing under Section 4 of the Clayton Act. In re Midwest Milk Monopolization Litigation, 730 F.2d 528, 532 (7th Cir. 1984); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 691 F. 2d 1335, 1342 (9th Cir. 1982), cert. denied, 104 S. Ct. 972, 79 L.Ed.2d 211 (1984).

- over what period of time this "sweat equity" would have been earned;

- what criteria for performance would have been agreed upon in establishing petitioners' rights, if any, to additional "sweat equity;" and,

- whether petitioners would have satisfied those criteria.

These factors make any apportionment of damages in this case exceedingly complex, uncertain and speculative.

Moreover, the Ninth Circuit properly found that there was a real danger of duplicative recovery in this case:

> Because the percentage interest of the stockholders of the potential corporate competitor was uncertain, the assessment of damage to the stockholder interest of the management group would be complex and leave the possibility that other potential stockholders could claim damages to their stockholder interest. This would result in duplication of recovery - for example, if the management group claimed twenty-five percent interest in one suit and the remaining potential stockholders claimed a ninety percent interest. . . . [t]he fact that the composition of the corporation was unknown, and the percentage of stockholdings and relative rights of the potential participants remained uncertain, would create very real problems in apportioning damages. (emphasis supplied)

Pet. App. A, 39a-41a. For these reasons, the Ninth Circuit properly determined that the complexity of apportioning damages and the danger of duplicative recoveries also supported the district court's refusal to confer standing upon the petitioners.

### D. Contrary to Petitioners' Assertions, the Court of Appeals Properly Balanced All of the Relevant Factors In Denying Standing to Petitioners

Petitioners place great weight on the Court of Appeals' consideration of the fact that the petitioners held no contract of any sort to acquire Rogers. They argue that the Court required that "all four of the typical factors" be present, "ignor[ing] its own jurisprudence that the four factors . . . are 'typical' and should be considered 'in varying combinations'." Pet. for Cert. at 17. In this respect, petitioners misunderstand the Ninth Circuit's analysis.

The Court of Appeals did find that the petitioners' failure to conclude any agreement with A&B was a factor which supported the district court's decision precluding petitioners' antitrust claims. However, the Ninth Circuit also based its conclusion on the undisputed facts that the petitioners did not have the commitments for the financial resources to acquire Rogers and that the petitioners had no agreement whatsoever on any other significant aspect of the petitioners' proposed purchase; i.e., no agreement with the investors, no agreement with the bankers, no agreement on the percentages of ownership, no agreement on stock rights, and no agreement to form the corporation that was allegedly to make the purchase. Thus, even had the petitioners concluded some sort of agreement with A&B, they still would not have been prepared to follow through with the acquisition. The lack of a contract with A&B was but one proper factor in the Court of Appeals' thorough analysis.[8]

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[8]Petitioners originally claimed that they had in fact entered into a contract with A&B for the purchase of Rogers. AMPCO App. D2-D4. The district court held that there was no genuine issue of material fact concerning petitioners' contract claim and granted A&B's motion for summary judgment on that count. (continued)

**II. There Is No Conflict Among the Circuits.**

Petitioners argue that this Court should grant the writ in order to resolve an alleged conflict between the Ninth Circuit's decision in this case and the Fifth Circuit's opinion in Industrial Investment Development Corp. v. Mitsui & Co., 704 F.2d 785 (5th Cir. 1983) ("Mitsui II"). In fact, there is no conflict.

Mitsui involved claims by a U.S. company that the defendants had infiltrated and gained control of plaintiff's prospective Indonesian joint venture partner as part of a scheme to restrain trade and monopolize the harvesting and exporting of timber from Indonesia. Under that country's law, a foreign company could not conduct business in Indonesia unless it joined with a local company. For that reason, plaintiff had reached agreement with an Indonesian corporation, and then received a forestry concession. Plaintiff alleged that defendants took control of plaintiff's Indonesian co-venturer and thereafter terminated the joint venture. As a result, plaintiff's forestry concession was automatically terminated.

In Mitsui I, 671 F.2d 876 (1982), the defendants moved for summary judgment on the pleadings, asserting that plaintiff lacked standing. The Fifth Circuit found that plaintiff had satisfactorily alleged its intention and preparedness to enter the business and that it was the direct target of the conspiracy. Id. at 886. More importantly, defendants in that case did not argue, and the Fifth Circuit did not consider, whether the damage claims asserted by plaintiff were speculative. The Supreme Court vacated Mitsui I and directed the Fifth Circuit to reconsider this decision in light of Associated General Contractors. Thereafter,

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Petitioners abandoned this contract claim on appeal and now claim that they were prevented from obtaining such a contract as a result of the alleged unlawful conduct of A&B and AMPCO.

the Fifth Circuit issued a one-page per curiam opinion. See Mitsui II, 704 F.2d 785 (1983).

The Fifth Circuit decision in Mitsui II applied the same factors in determining whether the plaintiff had standing, but to a completely different set of facts. Unlike this case, in Mitsui there was no question concerning the plaintiff's financial wherewithal or its overall preparedness to enter the market. There was no question as to who the participants and stockholders in the venture would be. Plaintiff's claims in Mitsui were neither speculative nor remote. Moreover, in an earlier opinion, the Fifth Circuit correctly observed that plaintiff had signed a joint venture agreement setting forth in detail the rights and responsibilities between the joint venture participants. 594 F.2d 45, 50 (1979). For this reason, any damages could be easily allocated between the prospective participants. Finally, plaintiff in Mitsui had actually obtained a forestry concession and had completed all steps necessary to become a competitor.

Both the Ninth Circuit in this case and the Fifth Circuit in Mitsui were guided by the factors discussed in this Court's opinion in Associated General Contractors. The Courts of Appeal applied these factors to dramatically different factual situations and understandably reached different results. There is no conflict between the Courts of Appeals, and hence there is no need for this Court to grant petitioners' writ.

## CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Submitted this 24th day of May, 1985.

Ronald E. McKinstry*
Richard J. Wallis
Al Van Kampen
Attorneys for Respondent
AMPCO FOODS INC.

*Counsel of Record

## APPENDIX A

### EXCERPTS FROM CR 127

(PARTIAL DEPOSITION TRANSCRIPT OF GILBERT E. COX, FORMER PRESIDENT OF ALEXANDER & BALDWIN, INC. June 30, 1981, at pp. 9, 24-28, 52, 73).

Q. . . . Exhibit 110, which appears to be a copy of letter dated July the 25th, 1978 from --

A. Uh-huh, Delgety.

Q. -- Delgety to you. Do you recall receiving that letter?

A. I do.

Q. Had you had any communications with Delgety prior to the receipt of that letter?

A. None. This came out of the blue.

Q. What did you do after you received that letter?

A. Sometime after the July Board meeting, I asked Mr. Ray Evans to get in touch with Mr. Stuart, who is the signatory on this letter, and set up a meeting with him the next time that Mr. Evans was to be in San Francisco and I am not sure whether that meeting was Mr. Evans alone or whether he had somebody else with him.

They did have such a meeting in San Francisco.

* * *

Q. * * * Can you tell me how long the meeting lasted with Mr. Gardiner in, at his office in San Mateo in late August of '78?

A. I would guess about two hours.

Q. What do you recall at this time concerning the discussions that you had with Mr. Gardiner at that meeting?

A. There was . . . a lot of discussion about the philosophy of Delgety, how they had started, this is a British company, as you know, this is their American subsidiary.

He told me a lot about the company, what they were trying to do in the way of growth in the United States, to some extent in Canada.

We discussed the Rogers operations. He was intensely interested.

I gave him orally what I had spelled out in the letter to him earlier in August and he indicated that they would have to look at it, that obviously he would have to get approval from the parent board in London, but all in all, he was very receptive and very desirous of doing a deal along the lines that we talked about.

. . .

Q. And then on November the 2nd of 1978, Mr. Cox, did you receive a letter from Mr. Gardiner informing you that Delgety did not wish to proceed with the acquisition?

A. I received such a letter, the date I guess is on this letter.

Q. I hand you what we identified previously as Exhibit 123 to this deposition?

A. Yes.

Q. You recall receiving that letter from Mr. Gardiner?

A. Yes, I do.

. . .

Q. Did Mr. Gardiner inform you of any reasons why Delgety had decided not to proceed with the acquisition of Rogers Foods, other than what is set forth in Exhibit 123?

A. No. It was a pretty firm turndown. There was no point in discussing it.

* * *

A. That subject, as indicated in that memo, came up at the end of our review session with the Rogers people and I think I said and I think anybody has said when they had been asked the question, Mr. Evans and Mr. Ulyshen, look, if you guys can come up with a firm deal that will enable us to achieve our objectives, obviously, we will talk to you. Nobody is going to cut anybody off.

* * *

A. That Justice asks for in one of these, if they want to raise a question.

Q. What did you do after you received that communication from --

A. I gave it to Mr. Evans and I said, "comply as best we can."

# APPENDIX B

## EXCERPTS FROM CR 128

(PARTIAL DEPOSITION TRANSCRIPT OF B. RAY EVANS, FORMER VICE-PRESIDENT, FINANCE OF ALEXANDER & BALDWIN, INC. September 1, 1981, at pp. 115, 304-305, and Excerpts from Exhibit 232)

* * *

Q. Which was your intent to sell the entire company as an ongoing operation, is that correct?

A. It was our statement that that was our desired goal.

Q. Can you tell me, sir, what the last two pages of this Exhibit 232 are, that is, pages 1345 and 1346?

A. The last pages are a compilation of all of the companies we have just reviewed individually, what their general interest was, and as to whether -- to restate, as to the status of that particular company's or party's interest.

* * *

EXHIBIT 232

| | Area of Interest | | | |
|---|---|---|---|---|
| | All | Garlic | Onion/ Potato | Status |
| Knut Andersen (Swiss) | | X | | Open |
| Con Agra (Touche Ross) | | X | | Open |
| Rich-Seapack | | X | | Open |
| Ingredient Tech. | | X | | Pre-negotiation |
| Ampco | | | X | Negot. agreement |
| Cal-Compack | | X | | Open |
| Ciba-Geigy | | X | | Pre-negot. |
| Corp. Finance Assoc. | | X | | Open |
| Cartapaesi Farms | | X | | Pre-negot. |
| First San Francisco (broker) | X | | | Assets at distressed Pr. |
| Dalgety | X | | | Potato bus. not good |
| Nestles | | X | | Pre-negot. |

| | Area of Interest | | | |
|---|---|---|---|---|
| | All | Garlic | Onion/ Potato | Status |
| Williams, Rossi, White | X | | | Broker-Fishing (Japan) |
| Foremost Foods | | X | | Competi-tor |
| Hunt Wesson Foods | X | | | Rejected |
| Lane Archibald Assoc. | X | | | Rejected |
| Baltimore Spice | | X | | Dead |
| Carl Marks (Camlden) | X | | | Rejected |
| Hansen Indus-tries (Lapard) | X | | | Rejected |
| Idaho Fresh Pak | | Rexburg | | - |
| Idaho Supreme | | Rexburg | | - |
| Gary Jensen | 1/2 | | 1/2 | Dead |
| Management Grp. | X | | | Lack Financial Ability |
| Milwaukee Cheese | | X | | Dead |

| | Area of Interest | | | |
|---|---|---|---|---|
| | All | Garlic | Onion/ Potato | Status |
| PHO International | X | | | Dead |
| Lane Van Orden (Touche) | X | | | No Interest |
| Shorax (Waiburg) | X | | | No |
| Peter Wagstaff | X | | | Distress sale basis |
| Universal Foods | | X | | Pre-negot. |

| | |
|---|---|
| All | 12-1/2 |
| Onion/Garlic | 13 |
| Potato | 3-1/2 |
| TOTAL | 29 |

A. * * * However, our attitude was such that we -- A&B -- were willing to do whatever the Justice Department told us to do. We therefore sought to cooperate in every way, supply them all of the information, and, as I indicated, on many occasions if the Justice Department told us that the sale was proper and allowed it to go ahead, we would sell. If they advised us not, we would not. And we took comfort in having the Justice Department reviewing this for that reason.

## APPENDIX C

### EXCERPTS FROM CR 128

(PARTIAL DEPOSITION TRANSCRIPT OF RONALD O. BUBAR, FORMER PRESIDENT OF ROGERS FOODS INC.
May 26, May 27 and July 30, 1981, at pp. 18, 79-80, 169-170, 277-278, 303).

Q When was your first contact with anybody from the Justice Department?

A I don't recall the exact date. The latter part of January or early February. That contact was in San Francisco, I don't recall the exact date.

Q You came to San Francisco around that time?

A That's correct.

Q Did somebody request that you do that?

A Yes.

Q Who?

A Mr. Ray Evans, Executive Vice President of Alexander & Baldwin.

Q All right. What happened at the meeting in San Francisco?

A I was asked a series of questions relating to the business of Rogers Foods, the financial position of Rogers Foods. Questions concerning the industry and the market place.

Q Where was the meeting?

A It was held in the Justice Department Building.

Q 450 Golden Gate Avenue?

A I believe that's correct.

Q The Federal Building in San Francisco?

A Yes.

* * *

Q Mr. Evans never did anything to discourage you from supplying the categories of information the Justice Department asked for, did he?

A No.

Q And I take it nobody else at A & B did anything to discourage you from supplying it either, is that correct?

A That's correct.

Q Now, after the conference telephone call, what did you do, did you at sometime decide that you ought to supply the affidavit or affidavits?

A Yes.

* * *

Q Let's talk about Dalgety and the possibility of their purchase of Rogers Foods in some more detail: From whom did you first learn about the discussion of possible sale of the Rogers Foods Company to Dalgety?

A Mr. Griesedeick.

Q When was that?

A It would have been late July or early August.

* * *

Q When was your next communication with anybody from Alexander & Baldwin about the possible management purchase of Rogers Foods?

A During the latter part of December, sometime between Christmas and New Years.

Q Who was it you talked to then?

A He stated that Alexander & Baldwin was prepared to give management a set purchase price for the stock of Rogers Foods.

Q And did he give you a purchase price?

A Yes.

Q What was it?

A It was $13.5 million.

* * *

Q Can you tell me what else was said about the possibility of management purchasing the company during this late December telephone call?

A He said the $13.5 million would have to be in cash, no paper money.

* * *

Q Now, earlier you testified that when you spoke to Mr. Evans after the January 9 meeting in which you discussed possible management purchase, he came back and told you that he was talking to AMPCO and so on and so forth, you said he offered the Onion Division to Nowatzki and yourself. Do you recall his exact words?

A I do not recall his exact words, I can paraphrase it if you would like. What he said was that I ought to

take a look at the Onion Division. He said it is not large enough for the entire group, but it would be something that probably would fit Mr. Nowatzki and I.

* * *

Q You did testify earlier about your conversation with Mr. Evans about the Department of Justice. And, as I recall, I asked you then about the instructions, if any, Mr. Evans had given you. And you testified that he told you to gather information that the Justice Department had requested, is that right?

A That's correct.

Q Now, did he or anybody else from Alexander & Baldwin ever do anything to impede the gathering or preparation of information for transmittal to the Justice Department?

A To my knowledge?

Q To your knowledge.

A No.

Q Did anybody else at Rogers Foods ever suggest to you that A & B's people were in any way interfering with or impairing your ability to gather together the information that the Justice Department had requested?

A No.

## APPENDIX D

(EXCERPTS FROM COMPLAINT, FILED JANUARY, 1980, CR 1, at pp. 1, 9-11)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

| | | |
|---|---|---|
| RONALD O. BUBAR, DONALD J. NOWATZKI, WILLIAM M. BARTH, CHARLES W. HOUPT, and JOHN J. NETTERBERG, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | COMPLAINT FOR TREBLE DAMAGES UNDER THE ANTI-TRUST LAWS, FOR DAMAGES PURSUANT TO COMMON LAW, FOR INJUNCTIVE RELIEF |
| AMPCO FOODS, INC., a California Corporation; ALEXANDER & BALDWIN, INC., a Hawaii Corporation; and ROGERS FOODS INC, a Delaware corporation, | ) | |
| Defendants. | ) | DEMAND FOR JURY TRIAL |

Plaintiffs allege as follows:

### JURISDICTION

1. This is a civil action under the antitrust laws for treble damages and costs of suit, including a reasonable attorney's fee, and under the Court's diversity and pendant jurisdiction for common law breach of contract and common law interference with business relationships.

* * *

31. In the latter part of 1978, A&B determined to divest itself of Rogers. A&B announced that it was seeking offers for the purchase of Rogers.

32. The president and other officers of A&B encouraged plaintiffs, the management group of Rogers, to attempt to purchase Rogers. The A&B officers stated that it was A&B's goal to sell the company as a complete entity, in order to preserve the employment of Rogers' personnel. A&B's vice-president for finance informed plaintiffs that the outstanding capital stock of Rogers could be purchased for a price of 13.5 million dollars. The said vice-president for finance stated that if the plaintiffs' group could meet that offer, they could acquire Rogers, regardless of other offers.

33. In January of 1979, the plaintiffs accepted A&B's offer to sell Rogers. The terms of said acceptance were in conformance with the terms which A&B officers had previously told plaintiffs would be required to acquire the company. The plaintiffs' proposal would have resulted in a net of $13.5 million paid to A&B.

34. Plaintiffs made the foregoing response to A&B at a meeting on January 9, 1979. Present at the meeting were A&B's vice-president for finance, A&B's corporate counsel, an executive vice-president of A&B, the plaintiffs Bubar and Nowatzki, and a representative of one of plaintiffs' investment bankers.

* * *

EFFECTS OF THE VIOLATIONS

38. The intended and actual effects of the aforesaid conspiracy in restraint of trade, conspiracy to monopolize, monopolization, and attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act, have been and are:

(a) Plaintiffs would have purchased the outstanding capital stock of Rogers, but for the defendant A&B's agreement with Ampco. The defendants' said course of action has excluded and eliminated competition from the market of a principal competitor of the defendant Ampco;

(b) Competition in the distribution and sale of dehydrated potato granules and granule-based products in the United States has been severely restrained and impaired;

(c) Competition for the purchase of fresh and process grade potatoes in Eastern Idaho and in the Columbia Basin of the States of Washington and Oregon has been severely restrained and impaired;

(d) The defendant Ampco has obtained a monopoly in a significant portion of the market for the sale of dehydrated potato products to the food service industry in the United States;

(e) The public has been and is being denied the rights and benefits of free competition in the distribution and sale of dehydrated potato products in the United States and in the purchase of fresh and process grade potatoes in Eastern Idaho and in the Columbia Basin of Washington and Oregon.

39. The actual effect of the aforesaid acquisition by defendant Ampco of the potato division assets of Rogers has been to substantially lessen competition or tend to create a monopoly in the distribution and sale of dehydrated potato products in the United States and the purchase of fresh and process grade potatoes in Eastern Idaho and in the Columbia Basin of Washington and Oregon.

* * *

41. A&B's actions in selling the assets of Rogers' potato division to Ampco, after plaintiffs had accepted A&B's offer to sell the outstanding capital

stock of Rogers, constitutes a common law breach of contract by A&B.

No. 84-1687

Office-Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS
CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1984

RONALD O. BUBAR; DONALD J. NOWATZKI; WILLIAM M. BARTH; CHARLES W. HOUPT; JOHN J. NETTERBERG; and JAMES F. PALO,
*Petitioners,*

VS.

AMPCO FOODS, INC., a corporation; ALEXANDER & BALDWIN, INC., a corporation; and R. FOODS, INC., a corporation,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENTS ALEXANDER & BALDWIN, INC. AND R. FOODS, INC.

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## QUESTION PRESENTED

Where petitioners were among those negotiating for possible purchase of a potato processing company, but had no contract and were neither able nor prepared to finance the purchase, was summary judgment for respondents properly granted on the ground that petitioners lacked standing to sue under § 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, because they were not injured in their "business or property?"*

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* Respondents are Ampco Foods, Inc., a corporation, Alexander & Baldwin, Inc., a corporation, and R. Foods, Inc., formerly known as Rogers Foods, Inc., a corporation. Pursuant to Rule 28.1, a listing of the parent companies, subsidiaries and affiliates of respondents Alexander & Baldwin, Inc., and R. Foods, Inc., is contained in the Addendum hereto.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENTS ALEXANDER & BALDWIN, INC. AND R. FOODS, INC.

## PRELIMINARY STATEMENT

Petitioners are former employees of respondent R. Foods, Inc. ("Rogers"), a processor of potato, onion and garlic products. Petitioners brought an antitrust action in 1980 after respondent Alexander & Baldwin, Inc. ("A&B"), the parent corporation of Rogers, sold Rogers' potato division assets to respondent Ampco Foods, Inc. ("Ampco"). Petitioners did not sue in their capacities as former officers or employees of Rogers but as alleged prospective purchasers of Rogers. A&B had offered to sell Rogers to petitioners, but they were unprepared and unable to finance the purchase.

The trial court granted summary judgment dismissing the action on the ground that petitioners lacked antitrust standing to maintain the suit: It was undisputed that at the time of the alleged antitrust violation petitioners were not existing competitors in the potato processing business, they did not have the ability to finance

the purchase of such a business and they had no contractual commitments to procure either the necessary facilities or the financing required to proceed.

The Ninth Circuit affirmed. Although recognizing that a potential competitor can have antitrust standing *if* he has a genuine intent to enter a market and preparedness to do so (Pet.Appx., p. 23a), the facts were that petitioners were never able or prepared to enter the market:

> "[Petitioners] were potential minority stockholders in a corporation yet to be formed, which sought to enter the processed potato market. The venture capital groups who were to be the seventy-five to ninety percent stockholders had not determined whether they were going to invest in the project. Even with the prospective participation of the venture capital groups, another $500,000 to $800,000 would yet have to be raised, either by debt or additional equity financing, and there were no commitments for such financing. The [petitioners] never had a binding contract or commitment or option to acquire the assets necessary to enter the market. We agree with the District Court that the [petitioners] in this posture did not have standing to bring this private treble damage antitrust action" (Pet.Appx., pp. 43a-44a).

No reason exists for this Court to review the judgment. The decisions below turn on the particular facts of the case. There are no conflicting decisions, no novel or important issues of law and no elements of great public interest at stake. In addition, the decisions below are correct: After extensive discovery, the evidence was undisputed that petitioners had not reached the point where they or anyone else had invested or were prepared to invest in the enterprise they hoped to form. Any injury was to petitioners' hopes of what might have occured *if* petitioners had invested in an entity that did succeed in buying Rogers' stock and entering the market.

## STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate. The facts are set forth in the opinion of the court of appeals (Pet.Appx., pp. 3a-

14a), where the evidence is viewed in the light most favorable to petitioners (Pet.Appx., p.3a).

In the summer of 1978, A&B decided to divest itself of its subsidiary Rogers. In July 1978 petitioners became interested in purchasing Rogers, if financing could be obtained (Pet.Appx., pp. 4b-5b). A&B told petitioners it would look favorably on the possibility of a sale to them (Pet.Appx., p. 4a). During the next several months, petitioners spoke to a number of venture capital groups and bankers in an effort to obtain financing (Pet.Appx., p. 5b). In November 1978, A&B publicly announced its intention to sell Rogers, and respondent Ampco expressed interest in purchasing Rogers (Pet.Appx., p. 4a). Ampco proposed in December to buy just the Rogers potato division assets for $10 million, leaving A&B with the onion and garlic division assets (Pet.Appx., p. 5a). A&B then proposed to petitioners a sales price of $13.5 million for all of Rogers (Pet.Appx., pp. 5a-6a). Petitioners were told A&B would meet with them and others interested in Rogers during the week of January 8, 1979; petitioners agreed to meet with A&B on January 9, 1979 (Pet.Appx., p. 6a).

Because A&B had indicated that it would accept certain of Rogers' assets as part payment, the cash that would have been required of petitioners to purchase the Rogers stock was $3.8 million (Pet.Appx., pp. 7a-8a). Petitioners intended to invest $300,000 among their six members as equity capital (Pet.Appx., pp. 35a-36a), but no money was ever put up (Pet., p. 4). There was no contention that petitioners intended to or could borrow the remaining $3.5 million, but they hoped venture capitalists would provide $2.7 million in exchange for a percentage, never determined, of the stock of a new corporation to be formed to acquire the assets or stock of Rogers (Pet.Appx., pp. 8a-10a, 36a). The venture capitalists, however, had not agreed to participate and there was doubt that they would (Pet.Appx., p. 9a); there was no agreement or understanding as to what percentage of stock petitioners would receive, who would be the other shareholders, or in what amounts (Pet.Appx., pp. 10a-11a). Another $800,000 would have to have been borrowed (Pet.Appx., p. 8a). Though petitioners had discussed with several banks the possibility of a loan, no commitments had been made; nor had any bank provided

a commitment for an $8 million line of credit required for working capital (Pet.Appx., pp. 8a-9a).

On January 9, 1979, petitioners advised A&B that the $13.5 million figure was acceptable but that they did not have financing and needed 120 days while the venture capitalists examined Rogers' books and presented the investment proposal to their investment committees (Pet.Appx., p. 12a). A representative of one of the venture capital firms, who attended this meeting, told A&B his firm needed six weeks to make a decision (ibid.). A&B declined to give petitioners an exclusive status or option as the only party A&B would negotiate with during the period and told petitioners it would "get back to them" (ibid.). After consultation among A&B management, A&B concluded that petitioners' proposal was unacceptable (Pet.Appx., pp. 27b-28). Thereafter, A&B informed petitioners that it had decided to sell the potato division assets to Ampco (Pet.Appx., p. 13a).

In late January 1979, the Antitrust Division of the Department of Justice commenced an investigation into the transaction (Pet. Appx., p. 13a). A&B told petitioners to cooperate with the investigation; they did so and provided statements and documents to the Department of Justice (ibid.). The Department of Justice announced in March that it would not challenge the transaction and the sale to Ampco closed March 15, 1979 (Pet. Appx., pp. 13a-14a).

Petitioners' complaint in the district court alleged a breach of contract by A&B, inducement of a breach of contract by Ampco and violation of the antitrust laws by Ampco, A&B and Rogers. The district court found that petitioners had had no contract with A&B to purchase Rogers (Pet.Appx., p. 24b) and also that petitioners had no standing to maintain a private treble damage antitrust action because they had no business or property injured by the alleged antitrust violation: "The Plaintiffs were merely negotiating for the purchase of Rogers Foods with Alexander & Baldwin" (Pet.Appx., p. 30b).

On the appeal, petitioners did not challenge the district court's dismissal of their breach of contract claim. The court of appeals

affirmed the summary judgment on the ground of lack of antitrust standing.

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. The decision below turns upon an analysis of the particular facts which were proffered to the trial court and raises no important question which should be settled by this Court.

Both the trial court and the court of appeals correctly analyzed the issue of petitioners' antitrust standing in terms of whether petitioners had shown a genuine intention to enter the processed potato market and a preparedness to do so (Pet.Appx., pp. 1a-33b). Contrary to the arguments made in the petition, the decisions below impose no new restrictions on antitrust standing and are not inconsistent with any other decision.

The district court used the analysis adopted in *Waldron v. British Petroleum Co.* (S.D.N.Y. 1964) 231 F.Supp. 72.[1] It recognized that petitioners satisfied the first two elements of consideration set forth in *Waldron,* but held, based upon the facts of the case, that they did not satisfy the other two.

In affirming the district court, the court of appeals reached the same result following a *Waldron*-type analysis, but also, as mandated by this Court in *Associated General Contractors v. Carpenters* (1983) 459 U.S. 519, 536 n. 33, carefully evaluated

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[1] The *Waldron* court pointed out:

"In determining whether a plaintiff has proved the requisite intention and preparedness, the courts have looked for varying combinations of the following typical elements:

"1. The background and experience of plaintiff in his prospective business. * * *;

"2. Affirmative action on the part of plaintiff to engage in the proposed business. * * *;

"3. The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business. * * *;

"4. The consummation of contracts by plaintiff" (231 F.Supp. 81-82).

the alleged injury to petitioners, the alleged wrongdoing of respondents and the relationship between them in light of the policy factors identified in *Associated General Contractors* (Pet.Appx., pp. 16a-19a, 38a-41a).

Both decisions below were based on the particular facts of the case—petitioners' failure to show preparedness and ability to become a competitor in the potato processing industry.

The contention in the petition that the court of appeals adopted the "shareholder derivative injury" rule as a technical bar to petitioners' standing is incorrect. The court of appeals expressly declined to "determine whether, in every case, a potential stockholder in a corporation to be formed to compete in a market would lack standing" (Pet.Appx., pp. 27a-28a). Rather than establishing a black letter rule, the court looked at the totality of the circumstances "in this case" (Pet.Appx, p. 30a) and concluded that the policy reasons why a stockholder may not sue for antitrust injury to the corporation are

> "*greatly magnified* when we have as plaintiffs potential stockholders of some amount between ten and twenty-five percent of the shares seeking treble damages for injury to their potential stockholder interest in a corporation yet to be formed, where the relative rights of these and other stockholders have not been agreed to by the potential investors" (Pet.Appx., p. 31a, emphasis added).

Nor, contrary to the petition (Pet., pp. 10-13), did either court below suggest that petitioners might have had standing had they sued in the name of the corporation to be formed or joined other parties.[2] And even had a corporation existed, the undisputed lack of ability to finance the business and the lack of contract commitments clearly remained to bar the corporation's standing. As the court of appeals pointed out:

> "[T]he corporation was the potential competitor and there was serious doubt as to *its* preparedness to enter the market.

---

[2] The court of appeals noted that the other parties did not even have the requisite intent to become competitors (Pet.Appx., p. 36a); joining them as plaintiffs would scarcely have improved petitioners' standing.

* * * * *

> "Because the corporation was only a potential competitor, the speculative nature of the harm is increased because of the uncertainty that *it* would ever have been financially able to become a competitor" (Pet.Appx., pp. 38a-39a, emphasis added).

Hence the lack of a corporate entity in this case, together with the lack of agreement as to who would participate in ownership and in what proportions, are simply indicia of the petitioners' total lack of preparation and ability to enter the market. They do not constitute a technical bar to standing. The first question which the petition claims to be presented is thus not even before the Court.

The anticompetitive actions alleged in the petition, e.g., the closing of some plants in 1980 and the 1982 changes in dehydrated potato product prices and in farm prices of fresh potatoes, add nothing to petitioners' standing. Petitioners were neither potato growers nor purchasers of potato products. As pointed out in *Associated General Contractors,* it is difficult to understand why, if the alleged violation had any anticompetitive effect on anyone, more directly affected entities have not asserted a claim in their own right (see 459 U.S. at 542, n. 47). Petitioners' concession that actual competitors or customers are not available to vindicate the public interest (Pet., p. 12, n. 2) sheds doubt on the proposition that anyone has been harmed at all.

The further assertion, that petitioners were directly injured because they had "long functioned as the officers and key executives" (Pet., p. 13) of Rogers is simply a belated attempt to bootstrap themselves into court based on Rogers' activity in the marketplace and not their own. Petitioners have conveniently forgotten that *they did not sue in their capacity as former officers and employees (Pet. Appx., p. 20b)*. Therefore, whether Rogers had been a market disrupter, or whether respondent Ampco was attempting to exclude Rogers, is irrelevant to the issue before the Court. The issue is not whether Rogers had a business or property

which could be injured by an antitrust violation, but whether petitioners did.[3]

**2. In determining petitioners' lack of standing, the court of appeals correctly considered the factors identified in *Associated General Contractors v. Carpenters.* The decision does not conflict with that of any other court.**

Petitioners' attack on the court of appeals for analyzing the standing issue in light of the factors identified by this Court in *Associated General Contractors* is frivolous. The Court there pointed out that it was impossible to announce a black letter rule that would dictate the result in every case and that courts "should analyze each situation in light of the factors set forth in the text" (459 U.S. 536, n. 33). The contention that the court of appeals should have determined standing without considering the speculative nature of alleged harm to petitioners, the potential complexity of apportioning damages and the risk of duplicative recovery (Pet., pp. 14-16) is thus foreclosed.[4]

Moreover, *Associated General Contractors* emphasizes that the central interest of the Sherman Act is in protecting economic freedom of participants in the relevant market (459 U.S. 538). In the case at bench, petitioners were never in the market either as consumers or competitors. Though petitioners may have intended to invest in a new entity which they hoped would become a competitor in the processed potato market, neither they nor anyone else did so. Not only did the entity not exist, but the courts below pointed out the uncertainty that such entity, if it had

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[3] Unlike the individual plaintiff in *Perkins* v. *Standard Oil Co.* (1969) 395 U.S. 642, upon which petitioners rely (Pet., p. 14, n. 3), petitioners were simply never in the business.

[4] Petitioners' reliance on cases such as *Bigelow v. RKO Radio Pictures* (1946) 327 U.S. 251 (Pet., p. 15) is misplaced. *Bigelow* concerns uncertainty as to the *amount* of damage caused by restraints imposed by defendants in violation of the antitrust laws on the business of the complainant. By contrast, the instant case turns on petitioners' failure to demonstrate that they had any business or property which could have been injured at all by an antitrust violation.

been formed, would have been financially able to become a competitor.

In light of the court of appeals' careful analysis of the record and the *Associated General Contractors* factors, there is no further analysis to be made. Petitioners have not shown in what manner additional guidance is required from this Court. The fact that this Court has said that "courts should analyze each situation" does not mean that this Court must review each such analysis.

**3. There is no conflict between the circuits raised by the court of appeals' affirming the dismissal of this action.**

No decision of any court has found standing in the circumstances present here where:

(a) Petitioners were not in business in the market affected by the alleged antitrust violation;

(b) Petitioners did not have the ability to finance the business or the purchase of equipment or facilities necessary to engage in the business; and

(c) Petitioners had made *no* contractual commitments to procure either the necessary facilities and equipment or the financing necessary to obtain them.

In a transparent attempt to manufacture a conflict, petitioners contend that the Fifth Circuit, "Under similar facts" (Pet., p. 18), found standing in *Industrial Inv. Development Corp. v. Mitsui & Co., Ltd.* (5 Cir. 1983) 704 F.2d 785. There is no comparison between the plaintiffs' state of preparation in *Mitsui* and petitioners' state in this case.

In *Mitsui*, an antitrust action had been brought by an American corporation and its two Hong Kong subsidiaries alleging a conspiracy to keep them out of the business of harvesting timber in Borneo for import into the United States. There was no question as to the financial ability of the *Mitsui* plaintiffs to compete in that market. Moreover, unlike petitioners in this case, the *Mitsui* plaintiffs had signed agreements, including a joint venture agreement with Telaga Mas and the necessary forestry agreement with the Indonesian government, prior to the time the defendants were

alleged to have infiltrated Telaga Mas and succeeded in having it breach its contracts with plaintiffs (see *Industrial Inv. Development v. Mitsui & Co., Ltd.* (5 Cir. 1979) 594 F.2d 48, 50). By contrast, petitioners in the instant case had no contract rights with anyone and no ability to finance their acquisition. Contrary to the assertion in the petition (Pet., p. 19), *Mitsui* does not suggest that an antitrust plaintiff need not have standing if it is alleged that the defendants' conduct prevented it from obtaining standing. *Mitsui* stands for no more than that *in the circumstances of that case* the prospective corporate shareholders had demonstrated sufficient preparedness to enter the market as to have standing to sue for disruption of their joint venture with Telaga Mas.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**(Addendum Follows)**

## ADDENDUM

## LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Alexander & Baldwin, Inc., a Hawaii corporation, has no parent company and no subsidiaries, other than wholly-owned subsidiaries, except the following: Central Maui Source Development, a Hawaii partnership, and Central Maui Water Transmission, a Hawaii partnership. Alexander & Baldwin, Inc.'s, affiliates, except wholly-owned affiliates, are: California and Hawaiian Sugar Company, a California corporation, Bay and River Navigation Company, a California corporation, Hawaiian Sugar Transportation Company, Inc., a Hawaii corporation, and Pacific Resources, Inc., a Hawaii corporation.

R. Foods, Inc., a corporation, is a wholly-owned subsidiary of Alexander & Baldwin, Inc., and has no subsidiaries and no affiliates other than affiliates of Alexander & Baldwin, Inc.